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MUSINGS ON 1973

By

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Each dawning year beholds us blithely Rise
With new-fledged hopes to face the future bent;
Each dying year finds us without the Prize.

In about a week, the people, the world over, will be ringing in the New Year with mixed feelings of hope and expectation as well as of uncertainty and apprehension. There exists in some countries a popular belief that drowning men have the power of total recall. If an abstract entity like the expiring year could conjure similar powers and look back on the events and happenings in 1973 what would emerge is a constantly shifting pattern of hopeful beginnings and unrealised progress, of accomplishments in some fields of endeavour and stagnation or frustration in others.

Momentous events in world affairs have been witnessed during 1973—the detente between the U.S. and the Soviet Union, the end of the Vietnam war, the Watergate scandal and the resignation of the U.S. Vice-President Mr. Spiro Agnew on conviction for an offence of evasion of income-tax on his plea of guilty, the replacement of monarchy by a Presidential form of Government in Afghanistan, the Arab-Israeli war, etc. The detente between the U.S. and the U.S.S.R. had given rise to hopes that it signalled a basic restructuring of international relations. Instead, the detente politics of the two super-powers is actually making the developing nations uneasy creating an impression that the two powers were out for developing spheres of their respective influence and that the other nations had no role to play in the evolution of a world order for the maintenance of international peace. The Arab-Israeli war has pinpointed attention to the dwindling influence of the smaller powers in a world that is being dominated in an ever-increasing measure by the U.S. and the U.S.S.R. The growing naval presence of these two powers in the Indian Ocean does not seem to bode well for that region being maintained as a zone of peace. If a nation like India had no place at the time of the Vietnam settlement and has been completely ignored in the efforts to achieve durable peace in West Asia one cannot but wonder what place the developing nations will have in the shaping of the future. The closing days of the year seem, however to be more promising for India if the talks between Mrs. Indira Gandhi and Mr. Brezhnev on the one hand and the assurances of American statesmen now being made as to the special role of India in the developing world on the other are taken at their face value.

On the home front also the picture is bleak and grim. Much was promised but not much was achieved. Plan projections and time-bound programmes

are constantly harped upon but no effective break-through in the socio-economic front has emerged. The problems of poverty and stagnation continue to confront the nation. The Constitution has been amended enabling Government to act swiftly and purposively in the matter of implementing the directive principles of State policy. Coal mines have been taken over by Government and it has entered the wholesale trade in foodgrains as well. The spectre of soaring prices, scarcity of essential articles in the ordinary markets and adulteration of even available materials confront the people. According to a survey recently conducted by the Institute of Public Opinion in Delhi, moral standards in India had touched an all-time low, loss of public confidence was all along the line whether it was big business or retail traders or civil servants and the entire establishment suffered from a credibility gap.[1] Again another survey conducted by the Consumer Council of India at the instance of the Union Deputy Minister for Health and Family Planning has brought to light that adulterators were responsible for the death of at least 1,063 people during the year, that there were 4,087 serious cases of food-poisoning due to adulteration, that almost everything from tooth paste to contraceptives was adulterated, so much so, the demand for the adulterants is so great that they are themselves in short supply.

Double standards are to be found in many spheres. One of the most sinister manifestations of it is the "sons of the soil theory". National integration is held out as a foremost objective. Yet, at the same time, in one State it is stated that 60 per cent. of the managerial posts and 90 per cent. of the lower categories of jobs are reserved for the sons of the soil. The Mulki Rules Act of 1972 provided for residential qualification in Telengana area for jobs and the latest six point formula has been criticised as being even worse inasmuch as according to the formula, recruitment to jobs would be on the basis of residential qualification in the concerned district. It is asked what then is the value to be attached to statements like that of Mr. Mohsin, Deputy Minister: "The Centre is opposed to the concept of 'sons of the soil' as prevalent in some States in matters of employment, since it is contrary to the very idea of national integration".

Pertaining to law and the judiciary, the most significant event of the year was the procedure adopted by the Union Government in selecting a successor to Chief Justice Sikri. The executive had been brought into the picture and the principle of seniority which had become a rule of guidance in the matter was deliberately abandoned. The action of Government sparked off an unprecedented controversy. The procedure adopted was criticised as authoritarian and as a shocking challenge to the concept of an independent judiciary. The stance of the Union Government that, under the Constitution, it was entitled to appoint only a person who had imbibed the philosophy of the Constitution as interpreted by the Government gave rise to considerable resentment among the members of the Bar.

It is disquieting that more than 12,000 cases are pending before the Supreme Court at the present time. The story is the same in regard to the High Courts also. The recent Constitutional Amendment to Article 133 restricting drastically the right of appeal to the Supreme Court may reduce the number of appeals hereafter. Simplification of the procedural law is in the offing and when carried out may cut delay and unnecessary technical

1. See "The Hindu" dated 20th September, 1973.

requirements. The tools may be good but the persons who wield them should be highly skilled and efficient if genuine progress is to be made in controlling arrears and litigation explosion. Unless the top-most members of the Bar are attracted to accept Judgeships without any appreciable sacrifice in regard to their earnings the expected results may not materialise. To attract such persons the salaries of Judges will have to be raised as was done in England commensurately with the high status of the office and the nature of work done by the Judges.

In the pre-Independence days it used to be said that the Executive often attempted to influence the judiciary at the lower levels. If what has been recently reported in the Newspapers is correct the tendency does not seem to have been eliminated altogether. It is reported that a learned Judge of the Allahabad High Court had in the course of a writ petition criticised a Deputy Minister of the U. P. Government as " acting in a most improper manner in writing a letter to a Sub-Divisional Magistrate....expressing his opinion on the merits of a criminal revision pending before him ", and that the learned Judge observed: "It was unfortunate that Mr.....who was holding a responsible office of Deputy Minister should have chosen to write a letter to the Sub-Divisional Magistrate....about the merits of a pending case. There is no doubt that Mr...acted in a most irresponsible manner not expected from a person holding the office of a Deputy Minister."[2] It is true that a single swallow may not make a summer but no one has stated how many are required to make it. It is not so much the number of such acts but their tendency that is deplorable.

It is interesting to note that the Supreme Court has made some very pertinent observations apropos the Penal Code and the way in which the principle of 'benefit of doubt' is often applied. It has been reported that Mr. Justice Krishna Aiyar in delivering judgment in a Criminal Appeal observed: "the punitive strategy of our Penal Code does not sufficiently reflect the modern trends in correctional treatment and personalised sentencing of the accused " "....our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic and a balance must be struck between chasing chances and possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents." "We might remind ourselves of a necessary social perspective in criminal cases which suffered from inadequate forensic appreciation. The dangers of exaggerated devotion to the rule of "benefit of doubt" at the expense of social defence and to the soothing sentiment that all acquittals were always good regardless of justice to the victim and the community demand a special emphasis in the contemporary context of escalating crime. The judicial instrument has a public accountability"[3]. These observations come like a breath of fresh air.

Among the judgments delivered by the Supreme Court during this year, the one that has made history is that in *Keshavananda's case*, upholding the validity of the Constitutional Amendments enabling Parliament to amend the rights in Part III of the Constitution for the purpose of implementing the Directive Principles of State policy. In the process, the majority judgment in *Golaknath's*

2. See "Madras Mail" dated 7th December 1973, p. 5.

3. See "The Hindu" dated 31st August, 1973.

BOOK REVIEW

I. THE BEACON OF THE WORLD OTHERWISE THE HORIZON OF THE UNFOLDING WORLD GOVERNMENT by *A.K. Pavithran*, Barrister-at-law, 1973. (Publishers: The Eastern Centre of International Studies, 22, Ritherdon Road, Madras-7) Price: India and Ceylon Rs. 27; South East Asia Rs. 40; in America, Europe and Africa 5 U.S. dollars or equivalent.

A form of World Government is necessary and looks inevitable. That a form of World Government is a strong possibility by the year 2000 is the opinion of a group of international experts who used a computer to forecast 10 major events for the future. We seem to be now at a most critical period in the history of the world. A single *faux pas* by a super-Power having a stock-pile of atomic weapons may hurl the world into destruction. How close we were to such a possibility can be realised from the reports that Russia was poised to apply nuclear weapons against Israel and blast it out of existence and how the U.S. had, to counter the move, ordered a universal alert of its own nuclear-powered task force.

The problem and the solution therefor are projected by the author as follows: There can be no human unity without peace. Peace must be based on justice which means that every man must be given his due. Peace is not possible unless the possibility of war is eliminated. Disarmament all round cannot be achieved without a mighty moral and mental effort. The concept of the divinity in man, the basic postulate of Hinduism, was known to the ancient Greeks also. The advice of the Upanishads, "Know Thyself" was also the injunction of the Greeks displayed at the Delphic sanctuary. Mutual understanding and appreciation of the spiritual values of both the eastern and western civilisations is necessary in building a bridge between the values of both. International law is the engineer to build such a bridge. According to the author, in the context of the present situation, an allout effort is needed on the international level cutting across nations, races, religions and traditions to bring home to all the essence of the Vedantic philosophy that man's real nature is divine and the aim of human nature is to realise the divine nature. The author feels that the international spirit is percolating at all levels of the specialised agencies of the U.N.O. and he envisages the emergence of a world community through a fusion of science, spirituality and religion.

Sri Pavithran's book is a closely reasoned vibrant call for achieving one world. He writes with conviction referring profusely to the scriptures of the world and the writings of great thinkers and philosophers. There can be no dispute that there is no alternative to World Government for ensuring the welfare and happiness of the human race. Though the author has written many books, the book under notice is a book of books giving expression to ideas coming from his heart. The book should be read by every thinking person. One would be the better for having read it.

II. LAW OF CONTRACTS by *M. Krishnan Nair*, Third Revised Edition, 1973. (Publishers: Orient Longman Ltd., Mount Road, Madras). Price Rs. 24.

The law governing contracts in India is to be found mainly in the provisions of the Indian Contract Act. That Act, however, does not profess to be a complete code on the subject. There are interstices. Also the provisions of the Act are largely the English law principles, evolved in England through judicial decisions over a number of centuries, adapted to suit the requirements of this country. A knowledge, therefore, of the leading English decisions is needed.

The Preface makes it clear that the book under notice is a student's textbook rather than a lawyer's reference book. The author is an experienced law teacher with an academic background and outlook and can competently present the law on the subject. The book is divided into two Parts. The first deals with General Principles of Contract taking due account of the provisions of the Indian Contract Act. It also deals with Specific Relief. The Second Part concerns itself with specific commercial contracts like Indemnity, Guarantee, Bailment, Agency, Sale of

Goods, Partnership and Negotiable Instruments.

The author has taken note of leading decisions, English and Indian. Some more leading pronouncements of Indian Courts as well as of the Privy Council could also have been noticed, for instance, the decision of the Privy Council in the *Venkatagiri case*, A.I.R. 1948 P.C. 150, which has intimate bearing on the implications of the doctrine of consideration. The author's treatment of the subject is attractive, his discussions are analytical and his exposition lucid and scholarly. With several model questions given at the end for the benefit of students the book should prove very useful and should amply meet their requirements.

III. THE CIVIL SERVANT UNDER THE LAW AND THE CONSTITUTION by *Dr. N. Narayanan Nair*, 1973. (Publishers : The Academy of Legal Publications, Trivandrum-1.) Price Rs. 50.

An efficient civil service is a *sine qua non* for the administration of a country, whatever be its pattern of Government. During the days of the British in India, the Indian Civil Service was regarded as the " steel frame " of the administration. The role of the civil service in a welfare state is not that of a routiner file-pusher or of a keeper of law and order only. A welfare state functions as 'protector', 'dispenser of social services', 'industrial manager', 'economic controller' and as 'arbitrator'. The civil servant's approach has to be resilient, responsive and responsible. He is today a major instrument of social policy.

The book under notice is based on a doctoral dissertation. It comprises nine Chapters. Ch. I forms an introduction dealing with the role of a civil servant in an egalitarian welfare state. Ch. II contains a careful examination of the question of the civil servant *vis-a-vis* the fundamental rights. Chapter III discusses the " *doctrine of pleasure* " in India. Ch. IV devotes itself to an examination of the measure of security afforded to the civil servant by Article 311 of the Constitution. Chapter V gives a full scale discussion of the meaning of the words "dismissal, removal or reduction in rank " with an incisive analysis of the relevant decisions of the Supreme Court bearing on them. Chapter VI considers the province of disciplinary proceedings. The author's concept of the Public Service Commission is elucidated in Chapter VII. The civil service tenure is discussed in Chapter VIII and the elements in the conditions of service which are justiciable are stated. Chapter IX entitled "Dynamics of Judicial Review" is devoted to a consideration of the remedies available to an aggrieved civil servant."

The author has not hesitated to express his own views wherever he found it necessary to do so : *see* page 33 criticising the view of the Kerala High Court that political opinion or association was a rational criterion for deciding suitability for public employment ; page 66 in regard to the construction of Article 16 (4) of the Constitution ; page 76 stating that the sweep of the obiter dicta in *Balakotiah's case*, A.I.R. 1958 S.C. 232 at 298 is too wide to be acceptable etc. The author's suggestion in Chapters VI and VII for the creation of a Special Tribunal, an independent body with power to hear appeals from all civil service matters, is one meriting serious consideration. There is much to be said for his view that even though judicial review goes to legality and not to merits, from the point of view of Government it unduly interferes with the maintenance of efficient service, while from the point of view of the employees there are not enough principles developed and procedures prescribed to render them substantial justice (page 352).

An appendix at the end gives the texts of the All India Services Act, 1961; the Kerala Public Services (Inquiries) Act, 1963 ; the Kerala Public Services Act, 1968 ; the All India Services (Discipline and Appeal) Rules, 1965 ; the Central Civil Services (Conduct) Rules, 1964 ; the Central Civil Services (Classification, Control and Appeal) Rules, 1965 ; the Kerala Civil Services (Disciplinary Proceedings Tribunal) Rules ; and the Kerala Public Servants (Inquiries) Rules, 1967.

The study of the subject is in depth. The exposition is lucid, marked by historical perspective, genuine research and systematic treatment. The book is a welcome addition to the literature on the subject.

IV. THE ADVOCATES ACT OF 1961 by *Raghunath Das*, 1973. (Selling Agent: Cuttack Law Times, Cuttack-2). Price Rs. 5 ; Board Bound Rs. 6-50.

It is estimated that there are about a lakh of advocates in India. It behoves every one practising at the Bar to acquaint himself with his rights, duties and responsibilities as well as the auspices and conditions under which he functions. The book under notice gives the text of the Advocates Act with occasional annotations. It gives also the Bar Council Rules, the Supreme Court Rules relating to an advocate, and the High Court Rules. The history and evolution of the institution of Advocates is traced in the Introductory Chapter. The scheme of the Advocates Act of 1961, its object, the changes effected by the Act, its salient features etc., are also set out. Model questions are given at the end furnishing also information as to where to look for their answers in the sections. The book will be helpful to law students and to new entrants to the Bar.

V. PROFESSIONAL ETHICS FOR LEGAL PRACTITIONERS by *Raghunath Das*, 1973. (Selling Agents : Cuttack Law Times, Cuttack-2). Price Rs. 10 ; Bound Rs. 12.50.

This book also seems to be for meeting the requirements of law students and young practitioners at the Bar. The author's aim is to acquaint the reader with the historical growth of the legal profession, its purpose and object, its contribution to the national movement, its social utility and vital role in establishing and maintaining a social order, its place in the judicial structure, the lawyers' duties to the Court and the client, to the public and the profession, to the colleagues and the opponent (Preface). The subject is covered in 9 Chapters. Chapter VIII gives the statutory rules and Chapter IX Canons: (i) the Lawyer's Ten Commandments, (ii) Hoffman's Fifty Resolutions, and (iii) Canons of the American Bar Association. The author has, in his exposition, taken note of important decisions relating to Professional Ethics. Model questions are given at the end.

The author's approach to the subject is on stereotyped lines. There is no reference to the impact of the winds of change in social and economic life on the role of the lawyer today or to questions like whether a profession, whose ideology and organisation crystallised during an era of outstandingly successful service to the needs of an individualised society, could adapt itself with like success to the needs of a welfare state and how. It may be suggested that the subject of professional ethics should also cover the aspects indicated above. Apart from the fact that the book runs on conventional lines it can be said that it constitutes an analytical and clear exposition of the subject.

VI. LAW OF CARRIAGE BY AIR IN INDIA by *A. B. Gandhi*, Barrister-at-Law. First Edition, 1973. (Publishers : Milan Publishers, 15/2, Navjivan Society, Bhadkamkar Marg, Bombay-8) Price (in India) Rs. 25 nett (Foreign) £ 2 or 6 dollars.

Air Transport, international as well as non-international, has become a matter of growing importance with the phenomenal increase in international transactions and business and commercial activities. Carriage by Air is in this country a relatively new subject and not properly developed. In 1911, the Indian Airships Act was passed followed by the Carriage by Air Act, 1934. This Act has now been replaced by the Carriage by Air Act, 1972, which came into force on 15th May, 1973. The 1972 Act, gives effect to the Hague Protocol of 1955. The book under notice refers in the Introduction to matters like the history of international air law, the object of the Warsaw Convention on the subject, the Carriage by Air Act of 1934 and the enactment of the Act of 1972. The Statement of Objects and Reasons attached to

the 1972 legislation is given in full. The author elucidates how the 1972 Act applies not only to international carriage by air but also to carriage by air which is not international (P. 29). Case law in India on the provisions of the Act of 1934 is little. Hence the author has sought light from English decisions. He has dealt with the provisions of the 1972 Act with clarity, providing comments in the light of decided cases. The book is bound to be of assistance to lawyers, students and to all persons connected with air transport.

VII. FOREIGN EXCHANGE REGULATION ACT (XLVI OF 1973), First Edition, 1973. (Publishers : Vora Prakashan, Ahmedabad). Price Rs. 4.

The Foreign Exchange Regulation Act of 1973 replaces the earlier Act of 1947 on the subject. The Introduction sets out the reasons for the replacement, which are mainly the effective implementation of the Government's policy and the removal of difficulties experienced in the working of the previous Act. The book also gives the Notes on Clauses of the Bill as originally introduced. Brief comments on the sections of the Act incorporating the relevant recommendations of the Joint Committee are provided. Comparative Tables are also furnished juxtaposing the provisions of the two Acts to enable appreciation of the changes brought about. The book will be of assistance to lawyers, merchants, businessmen and students alike.

VIII. PEOPLE'S VOICE by *A. N. Rao*, First Edition, 1973. (Publishers: Sadhna Prakashan, Meerut). Price Rs. 12: 3 dollars : £ 1 : 10.

This is a publication in the International Humanistic Studies and Social Sciences Monograph Series. The Preface states that " the purpose of writing this book is to place before the Congress Party and the nation faithfully and truthfully the thoughts and feelings, fears and anxieties, hopes and aspirations of the common people, and the construction, undertakings and concrete welfare measures they fondly desire to be initiated and completed." The book is divided into four parts. Part I describes the political scene in the country. Part II concerns itself with the image presented by foreign countries *vis-a-vis* India. Part III deals with defence and home affairs in India and Part IV with economic development. The author's survey focusses attention on the weak spots and weaknesses in the administration of the country by the Congress party in power. The author is categoric in his opinion that the postures adopted by the Shah of Persia in his support of Pakistan carry a standing threat to the Indian subcontinent and must be met by expansion of the Indian Army and equipping it with the most powerful modern equipment even if it may impoverish the country further. The author firmly believes that the Congress party alone can make the country a welfare state and there is no chance whatsoever of any other party or combination of parties functioning at the centre for many many years to come. Whether one subscribes or not to the author's views it is clear that he is a shrewd observer of men and events and his presentation is marked by close reasoning. His suggestions for eradicating poverty and lifting the country from the present economic morass, whether practicable or not, will be read with interest. The presentation of the 'people's voice' is attractive and makes interesting reading.

FIXATION OF UPSET PRICE

By

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In a recent decision reported in *Swathi Ammal* v. *Arulayee Ammal and others*[1], Justice Kailasam has set aside an execution sale on the ground that no notice was taken to the judgment-debtor for reduction of upset price.

In *Susila* v. *Saraswathi*[2], Justice Ismail has held that no such notice for an application for reduction of upset price is essential since a petition to reduce the upset price is not contemplated in the Civil Procedure Code and therefore want of such a notice is not a material irregularity affecting an execution sale. The question mainly turns on whether the executing Court is bound to fix the upset price for the property to be sold or not. If the answer is in the affirmative, then the further question arises whether any petition for reduction of upset price is essential and, if so, whether notice of such an application should be taken to the judgment-debtor.

Fixing upset price acts as a guidance for the intending purchasers to know the value fixed by the Court and to prevent the property from being knocked down for a low value.

There have been amendments to Order 21, rule 66, Civil Procedure Code, in different High Courts from the year 1929 onwards dealing with the settling of the sale proclamation. So far as this article is concerned, I propose to confine myself to the amendments made in Madras. Under Order 21, rule 66, the Court, while settling the proclamation of sale, is bound to notify the valuations of the decree-holder and that of the judgment-debtor. It is common knowledge that decreeholders grossly under-value the property while judgment-debtors give an exaggerated valuation. There will not be any material available before the executing Court at the time of the settling of the sale proclamation to assess the market value of the property. In some cases, the Court orders "test", *i.e.*, directs an Amin of the Court to inspect the property brought for sale and value the same. Even this test is unnecessary since while—effecting the attachment the Amin values the property. But the Court has no power under rule 66 to notify the valuation given by the Amin. Under Order 21, rule 66, the law requires the Court to fairly and accurately state anything which it considers material—*Thiruvengadaswami Iyengar* v. *Govindaswamy Udayar*[3], and any omission to state its value is not a material irregularity under Order 21, rule 90, *S.K. Veeraswami Pillai* v. *Kalyanasundaram Mudaliar*[4]. Therefore, with the available materials the executing Court taking into consideration all the facts fixes the value usually known as upset price or reserved price, *i.e.*, the price beneath which the property should not be sold. After the amendment of rule 66 the Court has a duty to notify the valuation of the decree-holder and judgment-debtor only and not state its own value. In *Thiruvengadaswami* v. *Govindaswami*[5], it has been held that the Court is not bound to give its value in the sale proclamation and the Court is under no obligation whatsoever to fix in the proclamation of sale its own value of the property to be sold. There are cases in which the judgment-debtor receives the sale notice under rule 66 and remains *ex parte* thereby disabling the

1. (1973) 2 M.L.J. 323.
2. (1970) 1 M.L.J. 192 : 82 L.W. 627 : A.I.R. 1970 Mad. 357.
3. A.I.R. 1927 Mad. 943.
4. 106 I.C. 201 : A.I.R. 1 927 Mad. 1009.
5. 55 M.L.J. 363 : I.L.R. 51 Mad. 655 : A.I.R. 1928 Mad. 503.

Court from knowing the judgment-debtor's valuation of the property. There are also cases when the judgment-debtor appears, but refrains from stating his valuation. In such cases the executing Court cannot comply with the requirement of rule 66 by notifying the value set by the judgment-debtor along with that of the decree-holder and the Amin as it is not within the purview of rule 66. If the valuations of the decree-holder and the judgment-debtor are available then the sale can be had even at the first instance by adopting the procedure prescribed in *Yellappa Naidu* v. *Venugopal Naidu*[6], "to begin the sale with the higher of the two values as upset price and if no bidders are forthcoming to go on lowering the upset price and when the lower of the two valuations is reached to start again with the lower valuation". To avoid such a quick disposal of the execution application and to gain as much time as possible, the judgment-debtors adopt the tactics of remaining *ex parte* and do not help the Court in giving their valuation, even if they appear, thereby disabling the Court to comply with rule 66 and the Court fixes its own value and in some cases the Amin's value (often very high and exaggerated) as the upset price. It is apparent that for such a valuation no sale will be held and the execution petition will be closed keeping alive the attachment. So when a second Execution Application is filed under Order 21, rule 66 the Court reduces its value and sale notice is taken to the judgment-debtor. Likewise it goes on for a long time, and after a number of fresh execution applications the value of the decree-holder is reached when he purchases the property in auction.

In such cases no petition for reduction of upset price is needed. There are other kinds of cases in which there are no bidders on the date of sale and the executing Court grants time for taking steps to reduce the upset price even in the same execution petition. Then a petition is filed to reduce the upset price and the Court reduces the valuation fixed by it earlier. Now, the question is whether notice of that application for reduction of upset price is necessary to the judgment-debtor and whether failure to issue such notice is a material irregularity vitiating the sale. This depends mainly upon the fact whether the Court is bound to fix the upset price at all. The following decisions have held that there is no obligation on the part of the Court to fix the upset price or state its own value. *S. K. Veeraswami Pillai* v. *Kalyanasundaram*[7], *Thiruvengadaswami* v. *Govindaswami*[8], *Srinivasan* v. *Andhra Bank Ltd.*[9], *Susila* v. *Saraswathi*[10], *Dharmalinga Chettiar* v. *Muthukumaraswamy Chettiar*[11]. In the recent decision of the Supreme Court reported in *Gajadhar Prasad* v. *Bhakta Ratan*[12], in Para. 15, Justice Beg, after considering the various decisions of all the High Courts has held, "it is certainly not necessary for it to state its own estimate....it may also be quite misleading if the Court's estimate is erroneous. Moreover Order 21, rule 66 (2) (*e*) requires the Court to state only the facts it considers material for the purchaser to judge the value and nature of the property. Hence the purchaser should be left to judge the value for himself".

In the following cases also it has been held that upset price must be fixed by the Court executing the sale. *Yellappa*

6. 70 L.W. 815 : A.I.R. 1958 Mad. 423.

7. 106 I.C. 201 : A.I.R. 1927 Mad. 1009.
8. I.L.R. 51 Mad. 655 : 55 M.L.J. 363 : A.I.R. 1928 Mad. 503.
9. (1948) 2 M.L.J. 569 : A.I.R. 1949 Mad. 398.
10. (1970) 1 M.L.J. 192 : 82 L.W. 627 : A.I.R. 1970 Mad. 357.
11. (1972) T.N.L.J. 125 (2).
12. A.I.R. 1973 S.C. 2593-2597.

Naidu v. *Venugopal Naidu*[13], *Mrs. Kamala Paul* v. *C.H. Rama Rao*[14].

Hence even though rule 66 does not invest the Court with a duty to state its own valuation, called as upset price, decisions have held both ways. The word upset price is not to be found in the Civil Procedure Code and rule 196 of the Civil Rules of Practice does not require the Court to fix the upset price. In R.O.C. No. 266 of 1971 R.R. published in the Tamil Nadu Government Gazette Supplement to Part V, dated 14th February, 1973 an amendment is proposed to rule 196 of Civil Rules of Practice and Circular Orders. The said rule is as follows:

"Matters to be determined by Court:" "The Court shall determine the lots, if any, in which the property shall be sold, the *upset price of* the property of each lot with reference to the probable market value thereof......" If this modification to rule 196 is finally approved the Court has to necessarily fix the upset price. In this connection it will be useful to point out that Index valuation is available in every Sub-Registrar's Office. So when an encumbrance certificate is taken by a party the Sub-Registrar can be directed to give the index valuation of various items which will help the Court to know the probable market value. One has also to take into account the enormous time taken in bringing a property to sale. If the judgment-debtor evades a notice under rule 66 he gets three weeks extension of time for fresh notice and if he evades that also then one has to take out substituted service by publication or otherwise. If everytime when a petition for the reduction of the upset price is filed notice is ordered to the judgment-debtor and he evades the notice much time will be taken before the Court fixes the price. One solution to this vexed question is possible. In cases where there are no bidders in an execution sale, the Court should close the execution petition keeping alive the attachment and direct the creditor to file a fresh execution petition. In that execution petition the Court reduces the value, and as usual, sale notice is taken under Order 21, rule 66. A petition for reduction of the upset price can be avoided once for all. Hence it is necessary to resolve the conflict of views on the question and to evaluate a clear-cut procedure as to,

(1) whether the Court is bound to fix the upset price?

(2) if so, what is to be done if the judgment-debtor's valuation is not available?

(3) whether notice of an application for reduction of upset price should be taken to the judgment-debtor?

Unless that is done the conflict of decisions as mentioned above is likely to continue for ever and there will be no certainty in any execution sale.

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13. 70 L.W. 815 : A.I.R. 1958 Mad. 423.
14. 82 L.W. 47 : (1969) 1 M.L.J. 344.

VALIDITY OF CONSTITUTION 30th AMENDMENT ACT, 1972.

By

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The Constitution (30th Amendment) Act of 1972 introduces a strange concept in our Constitutional history. The Act provides for curtailment of the jurisdiction of the Supreme Court in regard to civil appeals. Under the Constitution prior to the said amendment, an appeal lay to the Supreme Court as of right and without a certificate from the High Court in cases where the High Court varied or reversed a judgment of the Court below if the value of the subject matter of the appeal was over Rs. 20,000. The amendment purports to take away the said right and provides that an appeal shall lie under Article 133 only if the High Court certifies that the case involves a substantial question of law of general importance requiring to be decided by the Supreme Court. The point about the said Act which is taken up for consideration here is that the said Act according to section 1 (2) thereof is to come into force on a date to be notified by the Central Government.

Article 368 of the Constitution which provides the procedure for amendment of the Constitution provides that on the Bill for amending the Constitution being passed in Parliament with the requisite majority and on the assent of the President being given to it, the Constitution *shall stand amended* in accordance with the terms of the Bill. The effect of the words underlined is that on the passage of the Bill and on its being given the Presidential assent the amendment becomes incorporated in the Constitution *eo instanti*. As already noticed the 30th Amendment Act provides that the said Act is to come into force on a date to be notified by the Central Government. In so far as the Act runs contrary to the provisions of Article 368 and provides that the amendment shall come into force at the pleasure of the Central Government, it can be said that the purported amendment by the Bill is not effected by Parliament to which is given the prerogative to amend the Constitution but by the Executive. That is to say the 30th Amendment Act does not amend the Constitution *proprio vigore* but the amendment is effected by the notification of the Central Government. In other words the power of amendment has virtually been delegated to the Central Government. The question is whether such a delegation of constitutent power is permissible. It is no doubt true that the Constitution 13th Amendment Act of 1962 contained a similar provision which enabled the Central Government to bring it into force on a future date but that amendment related to certain transitory provisions in connection with the formation of the State of Nagaland which was constituted by the State of Nagaland Act (XXVII of 1962) and Article 3 of the Constitution enables Parliament to create new States by ordinary law and Article 4 provides that such a law containing a provision for the formation of a new State or for making incidental provisions was not to be deemed to be an amendment of the Constitution for the purpose of Article 368 even if the nomenclature given to such a law is a Constitutional Amendment. Hence it was permissible for the 13th Amendment Act to provide that it was to come into force on a date to be notified in future, since the said (Amendment) law was outside the purview of Article 368.

It is one thing for Parliament to provide in a Constitution Amendment Bill that it shall have retrospective effect, as was done in the 1st, 4th and several other amendments, or that it shall apply pros-

pectively from a future date specified in the Bill itself but it is an entirely different thing for Parliament in the purported exercise of its constituent power to delegate it to a constituted body. It is obvious that such a delegation of constituent power is contrary to the letter and spirit of the Constitution and is wholly void. It cannot also be contended that the 30th Amendment Act is outside the ambit of Article 368 on the ground that it is a law passed in accordance with Articles 131 to 140. Article 138 only provides that Parliament may by law confer *further jurisdiction and powers on the* Supreme Court than what is specified in the said Articles and Parliament is not empowered to make an ordinary law *curtailing* the jurisdiction of the Supreme Court conferred upon it by the said Articles. Such a curtailment can only be by way of an amendment of the Constitution falling sequarely within the provisions of Article 368 and such a Bill will have to conform to the provisions of the said Article. Thus it will be seen that the provision in section 1 (2) of the 30th Amendment Act making it operative from a future date to be notified by the Central Government seems to be *ultra vires*.

The question that next falls to be considered is whether section 1 (2) of the 30th Amendment Act which suffers from the vice of impermissible delegation is severable from the other portions of the Act and whether the other provisions of the Act can be saved by an application of the doctrine of severability which it has now been held can be invoked even in cases of Constitutional Amendments. Now it may be conceded that this is quite a difficult question to decide. It is rather difficult to make a conjecture whether or not Parliament would have passed the 30th Amendment Bill without the said section 1 (2). No plausible reason is discernible from the statement of objects and reasons appended to the Bill as to why if the amendment was needed at all (it appears that the amendment was proposed for reasons more doctrinaire in nature than otherwise) it was not to come into force immediately on its becoming an Act in the normal course. It may show that notwithstanding the fact the Act has now been notified to come into force on 27th February, 1973 *i.e.*, soon after it received the Presidential assent on 22nd February, 1973, there was really no urgent need for the amendment. Although the two portions, valid and invalid, are distinct they cannot but be deemed to be part of a scheme intended to be operative as a whole as mentioned in the 3rd proposition laid down by Venkatarama Iyer, J., in *R.M.D. Chamarbaugwala* v. *Union of India*[1]. Having regard to all the facts, it is difficult to take the view that the illegal portion of the Act is clearly severable from the rest. It has therefore, to be held that the whole of the Constitution (30th Amendment) Act is illegal and *ultra vires*.

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1. 1957 S.C.J. 593 : 1957 S.C.R. 930 : (1957) 2 An.W.R. (S.C.) 76 : (1957) 2 M.L.J. (S.C.) 76 : (1957) M.L.J. (Crl.) 547 : A.I.R. 1957 S.C. 628.

Companies Act:

WHAT IS "WHOLE", "SUBSTANTIALLY THE WHOLE," AND "SUBSTANTIAL" POWERS OF MANAGEMENT ?

By

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After the abolition of the managing agency system with effect from 3rd April, 1970, companies have by and large opted for the alternative system of management through the Board of Directors, with or without appointing managing directors, but so far as is known no company has attempted to try the other, alternative of appointing a "manager" which can still be done, in the place of the managing agents.

Who is Manager ?

Under the Companies Act, 1956, both the "manager" and "managing agent" could enjoy "the whole" or "substantially the whole" powers of management, while a managing director could have only "substantial" powers of management though all are subject to the eventual supervision, direction and control of the Board of Directors.

" Manager " has been defined in section 2 (24) of the Act, to the effect that he has the right to " management of the whole or substantially the whole, of the affairs of the company. But nowhere in the Act we can find a clear-cut definition. of "the whole" or "substantially the whole" affairs of the company or of the powers of management in these categories.

In contradistinction to the above, the managing director of a company, as defined in section 2 (26), is to be entrusted with only 'substantial' powers of management. The difference between the manager and the managing director is that the latter is given even less than ' substantially the whole' *affairs* of the company to handle, that is less than 'substantially the whole' *powers* of management too.

Nor again is "substantial affairs" or " substantial powers of management " defined anywhere in the Act, except that the proviso to section 2 (26) itself says that "the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw or endorse ony cheque on the account of the company in any bank or to draw or endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management."

So, clearly, it must be understood that even "substantial powers" of management mean a higher category of administrative duties not falling within the category of "routine administrative-duties" Therefore, "substantially the whole" powers of management is still probably of a higher degree with even greater administrative duties or responsibilities than those given a to managing director. A *fortiori*, the "whole powers of management" is of a superlative kind, and perhaps the difference between "the whole" and "substantially the whole" may be very little, or the difference is only like between Tweedledum and Tweedledee.

And yet it is clear from the framework of the Act and by the definition in section 2 (24) that the "manager" is subject to the superintendence, direction and control of the Board of Directors, which is a higher authority than the so far seen superlative officer, *viz*, the "manager." But the managing director with only some "substantial powers," which are not

"the whole", may also be appointed by the Board of Directors—*vide* section 309 (1) of the Act—and therefore even in his routine duties he is subject to the direction, control or supervision of the Board. The managing director cannot co-exist in a company with a "manager" (section 197-A). But a "manager" being much higher in the hierarchy of officers of the company cannot be appointed by the Board of Directors but only by the company in general meeting (section 385). The approval of the appointment of the manager has also to be obtained by an application to the Central Government.

In the case of a managing director too, in certain circumstances, the appointment has to be approved by the Central Government (*See* sections 309, 310 and 311); so also the remuneration payable, even if the Board or the general meeting has fixed it within the ceilings prescribed under the Act. And now the Central Government has also fixed some administrative ceiling for the remuneration of a managing director (but not for a "manager" for whom the ceilings under the Act still apply) which seems to have no relationship with the ceilings under the Act, excepting perhaps the maximum percentages of the net profits.

Pursuant to section 387, the manager can receive his remuneration either by way of a monthly payment, or by way of a specified percentage of the net profits, or partly in one way and partly by the other. Also, the remuneration of a managing director under the Act is 5 per cent of the net profits when there is one managing director and 10 per cent when there are more than one and they may be paid too either by way of a monthly payment or at a specified percentage of the net profits of the company or partly in one way and partly by the other. Though the statutory ceiling for a managing director and a manager is the same as regards remuneration, there is probably a wide difference in their powers of management.

Two or more managing directors can also co-exist in a company, if the appointments are approved by the Company Law Board. These multiple appointments should mean that a "substantial" power of management which is already less than "the whole" or "substantially the whole" powers is to be further shared between two or more managing directors. What quantum of "substantial" powers will go to make up "substantially the whole" or "the whole" powers of management is anybody's guess. Everything may depend upon the facts of the case. And further, one individual cannot be the managing director of more than two companies, ordinarily speaking, or more than a managing director in one company and manager in another (*See* section 386).

It is perhaps for this reason that the remuneration of both a managing director and a manager has been fixed at 5 per cent. maximum of the net profits in any one company, so that the same person may not get anything above the statutory ceiling for an individual for *e.g.*, 10 per cent.which a managing agent (if individual) could get from one company. It may be that the sum total of remuneration which a person gets of 5 per cent in one company as managing director and another 5 per cent in another company as manager, may differ from the 10 per cent which a person can get as managing agent of one company. But formerly, that is before the abolition of the managing agents, ten companies could be managed by the same managing agent. However, even now, there cannot be two "managers" for the same company, taking together 10 per cent remuneration. The administrative ceilings fixed by the Government is a different matter.

No definitions.

Be that as it may, we are now concerned with what are "the whole" or "substantially the whole" or "substantial" powers of management. It seems that in the absence of clear definitions, we can only make certain inferences from other provisions in the Act.

Of course, the company in general meeting can exercise all the powers taken by it in the Memorandum and Articles of association of the company. However there are certain actions, which under the Companies Act or any other Act or by the memorandum and articles or otherwise may be prescribed to be exercised only by the company in general meeting and which powers cannot be delegated to the Board of Directors, who are next in authority or the agents of the company to carry out the entire administration (section 291). Likewise, under the same section, subject to the above powers of the company at a general meeting, the Board of Directors shall be entitled to exercise all such powers, and to do all such acts and things, as the company can be authorised to exercise and do. The proviso adds that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf, in the Companies Act, or any other Act, or in the memorandum and articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.

In other words, the company exercises all its powers through the Board of Directors, except in those cases where the company itself is obliged to do them at a general meeting of the company (*e.g.*, appointment of sole selling agents under section 294).

Board's powers.

Now, in regard to the exercise of the powers by the Board, section 291 defines the "general powers of the Board," as we have seen above, and there are also certain powers to be exercised by the Board only at a meeting. There are also certain restrictions on the Board's powers under sections 293 and 293-A.

The sections under which the Board of Directors can exercise their powers only at a meeting (not by circular resolutions) are, for example: (*i*) under section 262, the power to fill up a casual vacancy in the Board; (*ii*) under section 297, sanctioning or giving consent to contracts in which directors are interested; (*iii*) under section 299, receiving disclosures of interests by directors; (*iv*) under sections 316 (2) and 386 (2), unanimous approval by the Board for appointing as a managing director or manager a person who is already a managing director or manager of another company; (*v*) under section 372, unanimous consent for making investments in companies and (*vi*) under section 308, receiving notice of disclosure of shareholdings of directors and some others.

Under section 292, the Board is given power by passing a resolution at a meeting to delegate to any committee of directors, the manager or any other, principal officer including a managing director, etc., the powers specified in clauses (*c*), (*d*) and (*e*) of sub-section (1) to the extent specified in sub-section (2), (3) and (4) respectively, on such conditions as the Board may prescribe. These powers relate to (*i*) the power to borrow moneys otherwise than on debentures; (*ii*) the power to invest the funds of the company; and (*iii*) the power to make loans.

So it must be inferred that except the following powers: (1) powers exercisable

by the share-holders at a general meeting (section 291) ; (2) powers exercisable, only at a Board meeting by the Board except those which the Board has delegated to the manager or other officials to the extent of such delegation all other powers which are of a residuary nature, naturally become included in "the whole" or "substantially the whole" powers of management, which can be exercised by the manager. These powers are roughly all the powers of management except those reserved exclusively for the company in general meeting and/or the Board of Directors.

Residuary powers.

It seems to me that it will be a misnomer to call these "residuary powers" as "the whole" or "substantially the whole" powers of management. But they are in one sense the "full", that is the whole or substantially the whole powers, because nothing more than those powers, after allowing for the other exclusively reserved powers by the statute itself, can ever be exercised by the manager, apart from the Board itself, which has got a general power of superintendence, direction and control over the manager. As a matter of fact, even the Board's powers do not extend to some powers which are reserved to the general body of share-holders and yet it should be accepted that the Board has more or less the entire powers of management, barring those exclusively to be dealt with by the general body of shareholders.

It may be easier now to follow why only "substantial" powers of management are given to the managing director and not even "substantially the whole" powers. It may be that the Board of Directors, when appointing the managing director on terms or on a contract, may yet cut out certain items from the "residuary powers" and entrust only the balance of the powers to him. Or the Articles too may provide only for certain powers to the managing director, which though "substantial" are not "substantially the whole". That will be in accord with the statutory definition of a "managing director".

Particular Aspect.

In the light of the foregoing, it would be well to examine a rather controversial if not incorrect, statement by a recent commentator of the Companies Act—R.H. Pandia in his "Principles of Mercantile Law", 7th Edn., 1967, p. 517. He states that, "the managing agent derives from an agreement with the company the powers of management which need not necessarily extend to the whole or even substantially the whole of the company's affairs, *They may in fact be limited to a particular aspect of its affairs.*" These observations can also apply *mutatis mutandis* to a "manager", that is because a manager too can enter into a contract with the company concerning his appointment, his powers too can be restricted to a particular aspect.

The italicised words above quoted will clearly be a contradiction of section 2 (24) or 2 (25) which define clearly that the manager and managing agent will both exercise the whole or substantially the whole powers of management. If the powers of the manager are to be so restricted to a "particular aspect", as suggested by the author, the manager's powers will be reduced even lower than the level of a managing director, who can have at least "substantial" powers, obviously over many aspects of the company's affairs, if not the whole affairs. By confining the manager's powers to a particular aspect of the company's affairs, he will become a mere departmental head in charge of a particular matter only, which can by no means be termed at least "substantially the whole" and certainly far short of

"the whole" powers of management. It will be even less than the "residuary powers" as defined by me above.

It is only for discharging the whole or substantially the whole powers of management of a company that a maximum remuneration of 5 per cent of the net profits has been prescribed for the manager.

R. H. Pandia further observes: "A manager is merely an executive, acting under the direct day-to-day orders and directions of the Board of Directors". The manager may be subject to the overall superintendence, direction and control of the Board, but having regard to the definition in section 2 (24) it will be too much to say that he is acting day-to-day under the orders of the Board of Directors. Within the broad policy laid down by the Board, he can act in his discretion in the day-to-day affairs. An agreement cannot be made with the manager (perhaps it could be made with a managing director) which is inconsistent with the exercise of the whole or substantially the whole powers of management but restricted only to a particular aspect. Without reducing him to the level of a departmental manager. It will be void under section 9 as contradicting section 2 (24). R. H. Pandia's definition makes the "manager" somewhat an "office manager", a paid employee.

THE TAMIL NADU AGRICULTURISTS RELIEF (AMENDMENT) ACT, 1972 (EXPLAINED)

By

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The Tamil Nadu Agriculturists Relief (Amending) Act has to be properly called "The Tamil Nadu Agriculturists Interest Relief (Amendment) Act", because the main and the principal relief given to the agriculturists by this Act is the release from burden of interest on their debts. With this intention, the Legislature has enacted this Act and it confers larger benefit on them than the principal Act of 1938. This will be apparent on a proper understanding of the amendment. Only, there is some redundancy in the actual enactment and that is due to bad draftmanship; but this defect should not and could not in any way detract from the real benefit of the Act. The lawyer has to interpret the Act, as it is without any colouring of any economic, political and social bias. Viewed in such a light, the Act perfectly fulfills, its object; only one has to ignore the redundant clauses or words in the Act.

The main complaint (this is only superficial) is that by the omission of section 8 (1) from the original Act, the Act does not purport to wipe out the interest as it is claimed and interest is yet payable at least in the cases in whch no payment at all is made. This is rather a wrong view, one should say. On the other hand because the Legislature wanted to wipe out all interest in all cases, it had perforce to omit section 8 (1) and add *Explanation I* to the section. This is apparent from the following discussion. The intention of the Legislature, as mentioned before, was to do away with all interest both outstanding and also interest that has been paid off and the amounts appropriated by the creditor towards interest. The interest actually paid and appropriated has to be reopened and reappropriated towards the principal. No doubt it is a drastic amendment but that seems to be the intention. The omitted section 8 (1) only wiped out the interest that was outstanding and it did not wipe out the interest already paid and appropriated and hence retention of it will not serve any purpose and necessarily it has to be omitted and this was properly done at the later stage of the passing of the Act even though it was there at the stage of the Bill and it is for this very reason, namely, to wipe out the whole interest paid and outstanding, they had to add the *Explanation I.* Therefore instead of implying that the interest is not wiped out the omission implied the contrary, namely interest outstanding and interest appropriated have been wiped out. This aspect and inference have to be remembered at all stages and then it will be clear the omission was properly done.

The next objection is that, at any rate, the interest accrued in cases where no payment at all was made is not wiped out by reason of the wording of section 12 namely "all debts which have been scaled down under the provisions of this Act" will carry interest at 9 per cent. It is said the provisions of the Act will apply only to the debts which have been scaled down under the Act and not to the debts which have not been scaled down and which remains untouched by the Act both as to interest and the principal. This again is the result of misunderstanding of the meaning of the words "scaled down' used in section 7 and hence the question that arises is "When does the scaling down happen". Is it automatic as the Act is passed or after the actual amount is ascertained by application :—

(*a*) The scaling down of the debt happens automatically as the Act comes into

force and any further application is not necessary for scaling down. This statement may take some of the readers of this article by surprise as it is usually thought that the actual scaling down occurs only on application. For scaling down the debt, no application is necessary; because the creditor cannot execute the decree for the full amount as it is and he can execute the decree only for the debt which stands scaled down under the Act. This is clear from section 7 which says "no sum in excess of the amount as scaled down shall be recovered". Hence it is not necessary for a debtor to file an application for scaling down. This is also made clear from the words used in sections 19 and 19-A. The applications contemplated under these sections is only one application "to amend the decree and the Court will have to apply the provisions of the Act to such a decree and shall amend the decree accordingly or enter satisfaction as the case may be" and an application under section 19-A is only an "application for the determination of the amount of the debt alone". It is to be noted the words "scaling down" are not used purposely in any of the sections 19 and 19-A whereas the words "scaling down" are used only in section 7. Therefore, if the "scaling down" takes place and the debts stand scaled down automatically as soon as the Act comes into force the debts where no payment is made also stand scaled down by interest disappearing and leaving only the principal outstanding. This automatic scaling down takes place by virtue of the omission of section 8 (1) and by the addition of *Explanation I.* In other words even the amount paid and appropriated towards interest has to be reappropriated towards the principal and when no part of the amount is appropriated towards interest accrued due and outstanding and when the interest is completely ignored and taken as non-existing, where is the qusetion of interest not being wiped out ? Certainly the whole interest including interest which has been discharged disappears from the scene and we are left with the principal. The intention is clear and all interest paid and appropriated and whether accrued due or outstanding on the date of the Act are wiped out by *Explanation I,* and the omission of section 8 (1) and it has also to be noted that the Legislature has nowhere recognised the existence or the accrual of interest in any debt whatever. When section 12 says 'the debts which have been scaled down' the words mean scaled down by virtue of section 7.

(*b*) It is pointed out that section 8 (2) and the first portion of section 8 (3) clearly contemplate payment of interest. But it is forgotten that the sections speak of only cases where payment has been made before 1st March, 1972 and not of future payments and it has also to be remembered that the Legislature did not intend to make any distinction or difference in conferring the benefit between cases where payment has been made and cases where no payment is made. It has to be taken that the Legislature intended to confer equal benefit in both the cases. In this connection one has to forget the historic or the economic view in interpreting a particular Act; it may be a valid reason for questioning the purpose of the Act and not for the proper interpretation of the Act itself.

(*c*) In this connection the judgment of a Bench consisting of Justices Ismail and Natarajan as summarised in T.N. L.J. in Part 31 at page 417 of 1973 is quite instructive and pertinent. It makes the position clear and has given a proper lead regarding the interpretation, and proper application. At page 427 it is said "under this circumstance, if the amended *Explanation I* is given effect to, as the Court ought to with reference to sub-section (3) of section 8 of the Act the principal amount alone in case no paymentwhatever

has been made will be payable by a debtor........ No Court can ignore or refuse to give effect to a particular statutory provision unless it comes to a definite and categorical conclusion that the particular statutory provision is unworkable". The last word has been said and one has to accept it and cannot wriggle out of or avoid the natural and logical result of the enactment.

Coming to the sections proper, the important sections are sections 7, 8, 12 and 13. Section 7 is the scaling down section. That is the only section which implies that the debts stand scaled down automatically as the Act comes into force and the creditor cannot recover anything in excess of the amount determined and if he claims more or if he executes the decree as it is, the judgment-debtor can resist and set up the provisions of the Act in defence without filing any separate application. Sections 12 and 13 prescribe future interest. The only controversial section is section 8. As already stated, section 8 (1) has been properly omitted. In view of the larger benefit conferred by the Act, section 8 (1) had to be omitted since only a restricted benefit, namely, only the interest outstanding on 1st October, 1937 is wiped out and it did not give relief with regard to interest discharged as the present Act does. It can at once be stated that section 8 (2) is unnecessary and redundant because if all the amounts paid either towards interest or principal have to be credited towards the principal, only the balance, if any, of the principal has to be paid. If the amount paid is equal to the principal or exceeded the principal, nothing is due. This result is achieved by *Explanation I*. Similarly, the first portion of section 8 (3) is also unnecessary since in this case also only the portion of the principal amount remaining, if any, has to be paid. Hence in both cases where double the amount of the principal or a lesser amount is paid, all the amount goes to the discharge of the principal and hence there can be only one case, namely, the balance of the principal, if any, will be payable. Hence, if the words "this shortage, or" in section 8 (3) is omitted, and section 8 (2) is omitted, the purpose of the Act will be served. That is why it was observed, portion of section 8 is redundant but because of the redundancy no confusion need be created unless it is in conflict with other portions of the Act; there is no such thing. As observed in the article appearing in Part 2 of (1973) 2 M.L.J., by Thiru Sridevan, Advocate. *P-Q* is always less than *P* or 2 *P-Q* where *P* stands for the principal and *Q* stands for the amount paid and hence sub-section (2) of section 8 and the words mentioned above in sub-section (3) of section 8 may be safely omitted to achieve the intention of the Legislature. They are to be ignored as mere surplusage.

DOES "ALLOTMENT OF SHARES" PRECEDE "ISSUE OF SHARES"*

By

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English Law

The provocation for this article came from my reading in "Ranking and Spicer's Company Law", 11th Edn. by R. E. G. Perrins and A. Jeffreys (published by The English Language Book Society and H. F. L. Publishers Ltd.) of the following passages (page 105):

"*Issued Capital*—The total number of shares *allotted*, whether for cash or other consideration, and whether actually paid up or not.

Subscribed capital—The total number of shares which have been taken up, or agreed to be taken up, whether actually paid up or not".

The several decisions of the Courts in England in this regard, on whether "allotment" is before "issue" (whether it is "issue of shares" or "issue of share capital" does not in my opinion make much difference) or after the "issue" are not quite clear. Likewise we have a decision of the Calcutta High Court and some observations of the Supreme Court (which also seem to cloud the matter. See *infra*).

The definition of "issued capital", given by the learned English authors, virtually meaning that it is the capital allotted, seems to run contrary to the commonly accepted notion that out of a certain capital issued (by means of a prospectus or otherwise) as an invitation for persons to subscribe, whatever is applied for by them ("offer" in a contract) and is accepted by the company ("acceptance" of the offer, to complete the contract) by way of communicating to the subscriber an Allotment Letter specifying the number of shares allotted to him by the Board of Directors. Those shares that are actually "allotted", in the real sense of the term, as a result of a person's offer and after the company's acceptance of the offer constitute the "subscribed capital".

For example, a company may be incorporated with an Authorised Capital of Rs. 10,00,000 consisting of 100,000 shares of Rs. 10 each, out of which the company may "issue" for subscription (which is normally called "issued capital") 50,000 shares of Rs. 10 each, for a total sum of Rs. 5,00,000. The difference of Rs. 5,00,000 will be regarded as "unissued capital". Subscriptions in response to this invitation may be made only for, say 40,000 shares, *i.e.*, for a sum of Rs. 4,00,000 which accordingly may be "allotted" and Rs. 4,00,000 will then be treated as the "Subscribed Capital". It may be that the company may not have "called up" the subscribed capital entirely at Rs. 10 per share, but according to the Prospectus, Rs. 2-50 may be payable along with the application, Rs. 2-50 after allotment, and the balance Rs. 5 in two equal instalments of Rs. 2-50 each. At the particular stage when all subscribers would have paid-up the "application money" and the "allotment money", (when alone they will be treated as subscribers or members of the company and become eligible for getting the share certificate), the sum so paid up for the 40,000 shares *i.e.*, Rs. 2,00,000 will be the paid-up capital. The balance of Rs. 20,00,000 out of the subscribed capital will be called

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*Based on the author's article in "Company News & Notes", Vol. VIII, July, 1970, and revised by him.

"uncalled capital". Suppose at a later stage the company calls up the "first call money" of Rs. 2-50 on each share. In response, if only half the number of subscribers pay up, then the addition to the paid-up capital will be only Rs. 1,00,000, which, together with the previously paid up capital of Rs. 2,00,000 will aggregate to Rs. 3,00,000. Still Rs. 1,00,000 balance of the subscribed capital will be left as "Unpaid Capital", though it is part of "Called-up Capital"—

From *a priori* reasoning it will be clear that if all the "Issued Capital" is to be treated as "Allotted Capital" according to the learned author's definition, there will be no difference between the "Issued Capital" and "Subscribed Capital", and besides, the order of precedence in a contract, "offer and acceptance" will get reversed. The learned authors describe the "Subscribed Capital" as the capital "taken up or agreed to be taken up" by the subscribers. In other words this would amount to saying that the company's allotment (of issued capital) will be taken as the "offer" (to the public in general) and the subscribers agreeing to "take up" immediately or later, wholly or partly, the offered shares will be tantamount to "acceptance" of the offer, so as to complete the contract.

It seems to me that the learned authors themselves have not consistently followed what they say (on page 88) that "a contract to take shares in a company is governed by the ordinary rules of contract, thus the prospectus is the invitation to treat, the application for shares constitutes the offer and *an allotment of shares by the company the acceptance*". This statement obviously contradicts their definition of "issued capital", as meaning "the total number of shares allotted". It does not even say "to be allotted". The past tense shows that a certain number of shares out of the Authorised Capital were already *allotted* for subscription as "issued capital".

The contractual theory about offer and acceptance propounded by the authors is, as we have already seen, the correct one and this is further clear from the later paragraphs on "Application of Shares" and "Allotment of Shares".

"*Application for Shares*" (1) Form: It is usual to make an application for shares subject to the terms of the accompanying prospectus and of the memorandum and articles of the company. The application form, should, therefore, be so worded as to show clearly the terms on which the shares are applied for. Hence forms of application are generally drafted "I/We hereby agree to accept the same or any smaller number *as may be allotted* to me/us". Otherwise if application is made for 100 shares exactly, and, because *the issue is over-subscribed, only* 50 *are allotted* there would be no contract to take the 50 allotted, and the applicant could refuse to take or pay for them. (Italics mine).

"*Allotment of Shares* (1) Form: An allotment of shares *consists of a resolution passed by the board of directors* followed by the posting of a letter of allotment but not until there has been communication of the allotment that the contract between the allottee and the company is complete".

If the shares representing "Issued Capital" are according to the authors' definition "allotted" shares, then obviously there is no substance in the above Application Form mentioning that the applicant will accept any lesser number of allotted shares in the event of over-subscription. In the paragraph on "Allotment of Shares", it is further made clear that only after the board of directors pass a resolution in that behalf that the allotment of shares can really take place (provided the allotment is also communi

cated to the allottee, when the contract becomes complete).

If "Issued Capital" consists of allotted shares, then further contradictions can arise when we consider the "Restrictions on Allottment" under the English Companies Act, 1948 itself.

Section 47 of the English Act states that where any share capital of a company is *first offered* to the public for subscription, no allotment shall be made unless: (i) the amount stated in the prospectus as the minimum subscription has been subcribed; and (ii) the sum payable on application for the amount so stated has been paid to and received by the company. If all the "issued capital" consists of allotted shares, how can these restrictions which must be taken care of before making the allotment, apply at all ?

Section 50 of the English Act again states that no allotment may be made until the third day after the day on which the prospectus is first issued, or such later day as may be specified in the prospectus. If "issued capital" should consist of allotted shares or allotted share capital, this restriction also cannot be followed without committing an offence.

According to section 51, where any prospectus whether issued generally or not, states that application has been or will be made for permission for the shares offered thereby to be dealt in on any stock exchange, any allotment made on an application in pursuance of the prospectus, shall, whenever made be void: if permission has not been applied for before the third day after the first issue of the prospectus, etc. This provision also really prohibits making any allotment before the third day, after the first issue of the prospectus (announcement of the issue of shares to the public for offering of subscription there to).

Take again section 52 of the same Act. The company is required to file with the Registrar of Companies, within one month of the allotment, (*a*) a return of allotments stating the number and nominal amount of the shares allotted, the names and addresses and description of the allottees, and the amount (if any) paid or due and payable on each share, and (*b*) a contract, in writing, in the case of shares allotted as fully or partly paid-up otherwise than in cash, constituting the title of the allottee to the allotment, etc. If the "issued shares" are really, already " allotted shares " or allotted capital, how could these details enumerated in clauses (*a*) and (*b*) above be known even before the would-be subscribers have sent to the company their applications for the allotment of shares, which, eventually may result in a whole or partial allotment of the number of shares allotted to the applicants by a resolution of the board of directors. Section 52 would then mean that the return of the allotment to the Registrar must be made within one month of the publication of the prospectus.

English Decisions

Chitty, J., says in In re *Florence Land and Public Works Co.*[1]: "A company having a share capital is required to state in its memorandum the amount of that capital and the division thereof into shares of a fixed amount—*see* our section 13 (4)— This is what is called the authorised capital of the company. Then *the company proceeds to issue the shares* depending upon the condition of the market. That only means inviting application for the shares. *When the applications are received, it accepts them and this is what is generally called allotment.* No doubt there may be an allotment of shares without an application but no instance exists where that word is used to describe a transaction whereby one becomes a shareholder

1. (1885) L.R. 29 Ch. D.421

otherwise than by appropriation to him of a share out of the previously unappropriated share capital.

What we have to note particularly in the above passage is the italicised phrase. Although it is not the actual *ratio decidendi*, the dictum means that extending an invitation to the public asking any one to apply for shares is an *issue of shares*. This takes place before the allotment, after the applications for shares are received and accepted. Suffice it to say that there is an issue of shares before the allotment and the shares so issued must necessarily constitute the "issued capital" which is still unappropriated share capital. What is issued, if such a description can be used, after the allotment, is not called "issued share capital" but more appropriately "subscribed share capital".

Farwell, L.J., says in *Mosley* v. *Koffyfontein Mines Ltd.*[2]: "As regards the constitution of these particular articles, it is plain that the words "creation" "issue" and "allotment" are used with three different meanings familiar to business people as well as to lawyers. These are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created, it may remain unused for years, as indeed it was here; the market did not allow of a favourable opportunity of placing it. *When it is issued it may be used* on such terms as appear for the moment expedient. *Next Comes Allotment*".

It is quite plain in the above passage that the shares credited (nominal capital) are used when the shares are issued as issued capital (or unappropriated capital) and only afterwards the allotment (or appropriation) comes. The last sentence in the above passage is quite categorical.

While these two cases: In re *Florence Land and Public Works Co.'s case*[3] and *Mosley's case*[4] are quite clear that "allotment" of shares comes only after "issue" of shares, there are other conflicting judgments, which fact was indicated in the beginning. In *Oswald Tillotson Ltd.* v. *Inland Revenue Commissioners*[5], the "issue" was held to refer to a stage after "allotment". In In re *Ambrose Lake Tin and Copper Co. Clarke's case*[6], *Spitzel's case*[7] and *Regent's case*[8], it was also held that no share is issued before an entry in the register after the contract of purchase (*i.e.*, where the contract is concluded by allotment and communicated to the applicant).

Indian Law

In India, prior to the decision of the Calcutta High Court in *Sri Gopal Jalan & Co.* v. *Calcutta Stock Exchange Assosiation Ltd.*[9], there was no doubt whatever that when shares were issued to the public by means of a prospectus or otherwise there was no allotment; but the allotment was made after the board passed a resolution making such allotment after considering all the applications received ("offer" of the contract) and "accepting" the same in whole or in part and approving the sending of an "Allotment Letter" accordingly ("acceptance" of the contract). But the Calcutta High Court held in this case that "the allotment of shares precedes the issue of shares".

The case related to section 75 (5) of the Companies Act, 1956, and the question

2. (1911) 1 Ch. 73, 74.

3. (1885) L.R. 29 Ch. D. 421.
4. (1911) 1 Ch. 73.
5. (1933) 1 K.B. 134 (C.A.).
6. (1878) 8 Ch. D. 635.
7. (1899) 80 L.T. 347.
8. (1904) 1 K.B. 263.
9. (1960). 30 Comp. Cas 454.

to be decided was whether the re-issue and reallotment of forfeited shares was an "allotment" about which the particulars had to be furnished to the Registrar in a return in the prescribed form. It was held by the Calcutta High Court that this re-allotment was not in the nature of a "first" allotment of unappropriated share capital, which only required filing, and not a re-allotment of forfeited shares which had already been allotted once before.

When the case went up on appeal, the *Supreme Court* confirmed the final decision of the Calcutta High Court as above[10]. But the question whether "allotment" precedes "issue" or not in the case of a public issue of unappropriated share capital was not decided by the Supreme Court in that case. But the Supreme Court decision quotes the opinion of Chitty, J. in In re *Florence Land and Public Works Co. case*[11] : "....It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares". We have seen another passsage from the same case, of Chitty, J., above.

Theoretically, it may be correct to say that allotment means an appropriation of a *certain number* of shares but not of a *specific number* of shares. But the procedure followed by companies is to mark in the "Allotment Letter" which is sent to applicants the distinctive numbers of the shares allotted to him, and instruct him to exchange the "Allotment Letter" for the share certificate later when he has paid the "allotment money"; he is also informed that the share certificate is ready for delivery to him. When distinct numbers of the shares allotted are mentioned in the "Allotment Letter" surely the allotment is made of specific shares. In some companies, when the first allotment is made by the board of directors, the resolution passed therefore is made to confirm the list of the allottees with their names and addresses and the specific or distinctive share numbers allotted to them. We have already discussed the other observation of Chitty, J. above. This applies to Indian law too.

The observations of Farwell, J. in *Mosley's case*[12] that "allotment comes next after issue", hold good for the provisions under our Companies Act, 1956.

While the Supreme Court has not particularly applied its mind to and given a finding on the question whether "allotment" precedes issue of shares, or it is otherwise, in *Gopal Jalan's case*[13], the Calcutta High Court has given another equally, if not more, controversial decision in *Shree Gopal Paper Mills Ltd.* v. *Commissioner of Income-tax, North Calcutta*[14]. This case does not seem to have gone on appeal to the Supreme Court.

Shree Gopal Paper Mills case[14], was a case of bonus shares, on which the assessee-company claimed a rebate in tax, which was disallowed for some reasons (not material for our purpose now). But the general observations of the Division Bench regarding the meaning of the words "issued to shareholders" as distinct from "issue of shares" are interesting and revealing.

Their Lordships say that the phrase "issued to shareholders" comprises of three components. The word "share" has more than one meaning in common

10. (1963) 33 Comp. Cas. 862 (S.C.) : (1964) 3 S.C.R. 698 : (1963) 2 S.C.J. 505 : (1963) 2 Comp.L.J. 198 ; A.I.R. 1964 S.C. 250.
11. (1865) L.R. 29 Ch. D. 421 at p. 426.

12. (1911) 1 Ch. 73.
13. (1963) 2 S.C.J. 505 : (1963) 33 Comp. Cas. 862 (S.C.).
14. (1967) 37 Comp. Cas. 240 : (1966) 1 Comp. L.J. 174 : (1966) 1 I.T.J. 296 : 64 I.T.R. 233 : A.I.R. 1967 Cal. 560.

parlance. The Indian Companies Act, 1913 defines a share thus: share means share in the share capital of the company and includes stock when a distinction between stock and share is expressed or implied—Section 2 (16) (corresponding to section 2 (46) in Companies Act, 1956). Therefore the statutory meaning of share covers the three phases of the share when it is a part of the share capital still remaining unexploited by the company finding a shareholder and lastly when the share is converted into stock. The first phase arises because under the Company law every company limited by shares has nominal or authorised or registered capital. It is to be mentioned in the memorandum of association and the capital so mentioned is to be divided into shares of fixed amount. The capital is usually fixed at some round figures according to the requirements of the Company. Therefore it seems that the first part of the definition of the word "shares" in the Companies Act refers to the share in the limited sense when "the share is still in the womb of the Company and has no shareholders".

So far there is nothing much controversial. However, their Lordships proceed to quote section 28 of the old Companies Act of 1913 (corresponding to sections 82 and 83 in Companies Act, 1956) and make other observations. This section 28 reads thus:

"(1) The shares or other interests of any member in a Company shall be movable property, transferable in the manner provided by the articles of the company. (2) Each share in a company having a share capital shall be distinguished by its appropriate number".

Their Lordships say, "therefore, the share *when it becomes associated with a member becomes a movable property*. It is however not a movable property whose transfer is solely regulated by the Sale of Goods Act. Its transfer is also governed by the Companies Act and/or articles of the company. Each share again bears a distinguishing number".

Shares' Association

It is here that one finds it difficult to agree. If the Companies Act also applies, it does not say that only when a share is associated with a member it becomes movable property. The old section 28 (cited above) and the present corresponding section 82 both say that a share is a movable property, transferable in the manner laid down by the Act and/or the articles of the company. We have also seen in a previous article that Farwell, L.J. in *Mosley* v. *Koffyfontein Mines Ltd.*[15] has defined the three steps with regard to new capital as "creation", "issue" and "allotment" and that till a share is created the capital does not exist at all. We are not concerned with the question of "transfer" at first but with the "creation" of the share itself. This creation is not the existence in shell or womb of the company, *i.e.*, mere mention in the memorandum.

How does a company create the shares? When the company passes a resolution in its general meeting to make an "issue of share capital" the share is created, waiting to be offered to the public by a prospectus, ordinarily. *As soon as the share is thus created it becomes a movable property* even if it is not tangible but a bundle of rights. How this movable property is to be transferred to the shareholder is a question which arises after the "allotment", *i.e.*, allotment of the rights. It is then that the special manner of "delivery" becomes material.

The High Court has observed further that "section 28 says it is movable pro-

15. (1911) 1 Ch. 73, 74.

perty. It is, however, not a tangible property for it is not a share certificate. Therefore it must consist of a bundle of rights and obligations etc." With great respect to their Lordships, I would like to say that there is something peculiar in the above line of reasoning, which is not commonly found in other judgments. Why should a share be a bundle of rights because it is not a share certificate ? It is a bundle of rights because it is intangible movable property.

Proceeding, their Lordships observe thus: "Therefore, a share can be either in the first phase or stage or in the second phase or stage. It cannot be suspended in any intermediate phase or stage".

We have seen above that the first phase or stage is the stage of creation, as a movable (though intangible) property. It has thus come to exist. Where, then, does an intermediate stage of "suspension" come in ? The property which has come into existence after the creation as aforesaid remains in the custody of the company till it is disposed of. Because there is no purchaser of the share yet, it does not mean that the share must remain "suspended". As we have seen it may take years in some cases for some purchasers to be found, and it cannot be that the share as movable property which has been long ago created has no existence whatever and is "suspended" for several years. (The company can be a "creator" without being the owner of the thing created. A purchaser or owner is not always necessary to start with to make an object exist. It is only after a thing has come into existence that a purchaser need be found to own it and until then it may well remain in somebody's possession).

Their Lordships then discuss the *modus operandi* of the transit from one phase or stage to another, to appreciate the meaning of "issue", which according to them means "sending out" or "putting out". How could a non-existing thing (for want of an immediate purchaser) be sent out or put out for sale ?

Forfeited Share

If it is argued that the second phase or stage is the stage of the purchaser owning the share and that only on finding such purchaser the share can remain a movable property, then let us see how this principle can apply to forfeited shares. The forfeited share has lost its owner and reverts to the company's custody (not company's ownership) as a movable property only. The forfeited share cannot go back to the "womb or shell" of the company to be "created" again. If this movable property without an owner at the moment can validly remain in the custody or possession of the company till it is again disposed of by the board of directors, then what objection there could be for the company initially keeping custody of the created objects *i.e.*, the movable property represented by the shares ? Surely there can be no "suspension" of the forfeited shares because these shares have no owners till such owners are found.

Destination

The Calcutta judgment then makes a distinction between "issue of share" and "issue to shareholder". It is stated that the word "to" in the latter phrase connotes a movement with a direction or destination. One can have no objection to this distinction. But in my opinion, with respect to the learned Judges, this argument itself shows that in the former case of "issue of shares" no movement need be pre-supposed and a destination for the shares (*i.e.*, an owner) is not necessary at that stage.

After analysing how a person may become a shareholder in a company, their Lordships themselves say, "Hence the words 'to shareholders' do not have the destination at large but circumscribe the destination to shareholders. This destination, that is, shareholders can be reached only when an existing shareholder becomes the owner or holder of the share and not otherwise". And again, "The words 'share issued to shareholders' signify that the share in the shell or womb of the company has found an owner in an existing shareholder, for once it issues out, it cannot remain in the air but becomes attached to a purchaser or owner."

Here is, therefore, a reversal to the old theory of the womb or the shell, which as we have seen, no longer hold good once the shares have been created by a resolution of the company to make a public offer or issue of a definite number of shares, nor to the case of forfeited shares which revert to the custody of the company without "remaining in the air".

If the "issue" is only after the allotment and therefore "issued capital" must be construed as capital actually issued to shareholders with specific distinct numbers *i.e.*, the shares have found their destination, then the construction of sections 106, 107 and 399 of the Companies Act, 1956 will be different from what probably was deliberately intended by the Legislature because in these sections "issued shares" or "issued share capital" have been used in the sense of shares issued or share capital issued before the allotment.

Voting Power

In most sections where a certain number of persons with a certain percentage or proportion of the "total voting power" are required to take the initiative for some proposed action, the voting power is always reckoned on the amount of the paid-up capital; see section 87 (1) (*v*) and section 2 (48) which defines "total voting power" as the total number of votes which may be cast in regard to that matter on a poll by the members present at the meeting, who being entitled to vote, cast their votes. For example in sections 169, 171, 179, 235 and 332 the proportion mentioned is 1/10th of the total voting power. In section 188 it is 1/20th of the total voting power and in section 375, 1/5th or 3/4ths of the total voting power. Similarly in cases where special resolutions are prescribed in the Act, they should be passed by a majority of 3:1 votes polled.

However, in sections 106, 107 and 399, as we have seen the consent of a certain proportion of the holders of issued shares (or issued shares of that class) are mentioned and not any relation to "paid-up" capital.

Section 106 (1) reads thus: "where the share capital of a company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the *issued shares* of that class or with the sanction of a special resolution passed at a separate meeting of the holders of the *issued shares* of that class".

Issue is Offer

What is the meaning of "issued shares" here? Is it what was offered to the public before the allotment or after the allotment? If it is the former, then three-fourths of the value of those issued shares may (unless the issued capital is equal to the paid-up capital) be more than three-fourths the value of the paid-up capital. It is likely to be more than three-fourths of the subscribed capital also, for that matter. Do these "issued

shares" before allotment have no real existence, in those cases where they have not found a destination or purchaser as yet? It seems that the Legislature has deliberately intended a higher ratio by stipulating "issued shares" instead of basing a rule on total voting power.

In section 107 also, similarly, what is prescribed concerning the rights of dissident shareholders is ten per cent of the *issued shares* of that class. Here also, if at least some of the *issued shares* have no owners, the ten per cent has to be reckoned nevertheless on the basis of the issue before allotment. If it were otherwise, the Legislature would have said expressly, as in most other instances, 1/10ths of the total voting power of that class of shareholders instead of 1/10ths of the value of the issued shares.

Take again section 399 which treats of the right to apply to the Court for relief in cases of oppression (section 397) and mismanagement (section 398). Sub-section (1) of section 399 reads thus:

"The following members of a company shall have the right to apply under section 397 or 398 (*a*) in the case of a company having a share capital, not less than one hundred members or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than *one-tenth of the issued share capital* of the company provided, etc....."

Here too the issued capital may be much larger than the capital subscribed and paid-up, that is the owners of the "shares".

Issue is not Delivery

These cannot be regarded as exceptions. They concern a vital implication of a term "issue" or "issue of shares" in a technical sense. In fact it is clear that the word "issue" is used in a strictly legal sense only in these cases, which are before allotment and the use of the word "issue" to denote the movement after the "allotment" is only in a loose sense of giving delivery, rather than "sending out" or "putting out".

There is again another supporting argument for the proposition that an "issue" is before the "allotment" in section 75 regarding return to be sent to the Registrar as to allotments. Sub-section (5) of this section reads: "Nothing in this section shall apply to the *issue and allotment* by a company of shares which under the provisions of its articles were forfeited for non-payment of calls". Notice the order of precedence in the phrase "issue and allotment".

So it is apparent, that the Indian Legislature has deliberately used the word "issue" in a technical sense as referring to something before the allotment of a share and not as a subsequent act after the allotment, probably being conscious of the fact that, whatever, a 'share' may mean in England, it is here a 'movable property', which can be issued before the allotment to constitute what is called "Issued Capital". When, after the application is made by a person for allotment and the application money is received from him, the share in question becomes part of the "subscribed capital"; till then that share remains part of the "issued capital".

COMPANY LAW : INSPECTION OF DOCUMENTS-I MEMBERS' RIGHT TO INSPECTION, AND COPIES, OF DOCUMENTS.

By

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Nowadays, some shareholders' associations have been formed in different parts of the country, to look after their members' interests. Apart from the associations, greater awareness of their rights, or becoming more interested, in the affairs of their companies by shareholders are becoming increasingly evident as some of them write frequently to the companies to enlighten them on many particulars. This is a healthy turn from the previous situation when the shareholders were only anxious to get their dividends regularly. In this context, it would be well that shareholders know their rights to ask for certain information or copies of documents, etc.

It would be better if certain premises are clearly understood even at the outset : what membership in a company means, whether a member is identical with a shareholder, whether shareholders as a body are identical with the company, or they are distinct from the company, and, if so what generally are their rights *vis-a-vis* the company and how these rights are documented. It is proposed to discuss these aspects briefly, as a preliminary study.

Section 41 of the Companies Act, 1956, gives the definition of a "member" : (1) the subscribers of the memorandum of a company shall be deemed to have become members of the company, and on its registration, shall be entered as members in its register of members ; (2) Every other person who agrees in writing to become a member of a company and whose name is entered in the register of members shall be a member of the company.

The terms "member" and "shareholder" are not always synonymous. It is true only in the case of a company limited by shares or a company limited by guarantee and having a share capital or an unlimited company whose capital is held in definite shares. In the case of a company limited by guarantee but having no share capital, membership of the company is regulated by such company's rules. In this case the member holds no shares at all.

The Supreme Court has held in *Bacha F. Guzdar* v. *Commissioner of Income-tax, Bombay*[1], that a company is a juristic person entirely distinct from the shareholders. A shareholder who buys shares does not buy any interest in the property of the company. His true position is that on buying shares he becomes entitled to participate in the profits of the company if and when the company declares, subject to the articles of association that the profits or any portion thereof should be distributed by way of dividends, among the shareholders. He has a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole.

And section 36 (1) of the Act lays down that, subject to the provisions of the Act, the memorandum and articles when registered, bind the company and the members to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles. In *Shiv Omkar Maheswari* v. *Bansi Dhar Jagannath*[2], it

1. (1955) 25 Comp. Cas. 1.
2. (1957) 27 Comp. Cas. 255: 58 Bom. L.R. 3: I.L.R. (1956) Bom. 100 : A.I.R. 1956 Bom. 459.

was observed that, on a plain construction of this section, the articles of association of a company do constitute a contract, not only between the company and its members, but even between the members *inter se*. But even between a member and the company the articles of association constitute a contract only in respect of his rights and liabilities as shareholder, but not in respect of rights and liabilities which he has in a capacity other than that of a member.

Books of Account.

What are proper "books of account" to be kept at the registered office of the company is stated in section 209 (1) of the Act. This section reads thus :

"209. (1) Every company shall keep at its registered office proper books of account with respect to (*a*) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; (*b*) all sales and purchases of goods by the company ; (*c*) the assets and liabilities of the company ; and (*d*) in the case of a company pertaining to any class of companies engaged in production, processing, manufacturing or mining activities, such particulars relating to utilisation of material or labour or to other items of cost as may be prescribed, if such class of companies is required by the Central Government to include such particulars in the books of account.

Sub-section (3) relates to when such proper books of account shall not be deemed to be kept. That will be so, with respect to the matters specified in such books of account, if there are not kept such books as are necessary to give a true and fair view of the state of the affairs of the company or branch office, as the case may be, and to explain its transactions.

In the light of the above and the general back-ground about the rights of members stated already the decision in *Maharani Lalita Rajya Lakshmi* v. *Indian Motor Co., (Hazanbagh) Ltd. and others*[3], about the rights of the company has to be appreciated. This case laid down that denial of access to or inspection of books of account of the company to a shareholder is not an act of oppression or within the meaning of section 397 of the Act because a shareholder has no such right under the Companies Act. It was further contended on behalf of the appellant that although she had no legal right, it was a proper act of company management and she having more than 30 per cent of the shares, should have been given such access and inspection. That argument was not accepted by the Court because to concede such a right will be to permit the directors to do something which the law will not permit them to do or which might be objectionable in law, besides that every shareholder will claim such right and to allow some and to deny others will lead to discrimination and confusion.

Inspection relating to the books of account and other books and papers by the directors or the Registrar of Companies or any Government Officer authorised by the Central Government is dealt with specially in sub-section (4) of section 209. The Companies (Amendment) Bill, 1972, has proposed some amendments to this sub-section and added a new section 209-A to the Act, on this subject. But we are not concerned in the present article with the rights of the directors, Registrar or authorised officer. There is no other provision in this section or elsewhere dealing with similar rights conceded to the members of the company.

In this connection it will be interesting to note that in the case of a charitable

3. (1962) 32 Com. Cas. 207: 66 Cal. W.N. 63: A.I.R. 1962 Cal. 127.

company which is sought to be registered with a licence from the Central Government under section 25 of the Act, the Government can insist (sub-section 5) upon the inclusion of a provision in the company's memorandum or articles on the right to inspection of specified account books. But in the case of a company limited by shares, Reg. 95 of Table A of Schedule I or like provision in the Articles of a company is not compulsory and a company has got a right to deny its members the right to inspect its account books by not making a provision in this regard in its articles. Even so, it would be committing no violation of the Act. We shall see more of Reg. 95 of Table A later on.

The Companies Regulations 1956 is binding or can be made binding in every respect on "section 25 companies ", unlike Table A. Such a company must adopt for its memorandum the Form given in Annexure I of these Regulations, or a form as near thereto as circumstances admit (Vide Reg. 6). Clause 9 in the memorandum in Annexure I reads thus :

" True accounts shall be kept of all sums of money received and expended by the company and the matters in respect of which such receipts and expenditure take place and of the property, credits and liabilities of the company ; and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the regulations of the company for the time being in force, *the accounts shall be open to the inspection of the members, etc.*"

Books and Papers.

It seems to follow by inference from section 209 (4) which does not include members that the member cannot have access to every one of the documents referred to in the definition of "book and paper" or " book or paper " in section 2 (8) of the Act, as including accounts, deeds, vouchers, writings and documents, subject to some exceptions as we shall see presently.

There are some specific provisions in the Act which categorically allow a right of inspection of only certain kinds of books or papers, *i.e.*, documents enumerated in the concerned sections, under certain conditions, general or special. Apart from these enumerated rights to inspection, taking of extracts from the documents inspected or requiring of copies of such documents or parts thereof in some cases, it must be presumed that the share-holder has no right to inspect all kinds of "books or papers." The documents of which inspection is allowed to a member seem to comprise mainly of certain Registers maintained by the company or copies of returns submitted to the Registrar of Companies or of other papers filed with the Registrar. This we shall deal with one by one a little later.

Regulation in articles

However, under the heading "Accounts" in Table A of Schedule I there is a regulation No. 95 which states, "(1) The Board shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations, the accounts and books of the company, or any of them shall be open to inspection of members not being directors ", despite the fact that section 209 does not contemplate such rights in favour of members nor is there any other section conceding such right specifically. This is also clear from clause (2) of Reg. 95 which reads: "No member (not being a director) shall ha[ve] any right of inspecting any acco[unt] book or document of the [company] except as conferred by law

by the Board or by the company in general meeting." While this latter part is not apparently inconsistent with section 209 (1), *see* supra, members can have such a right to inspect the books of account provided such inspection has been authorised by the Board or by the company in general meeting in regard to specifically described documents of that kind.

It seems to me that Reg. 95 itself, or any adaptation of it by a company in its Articles of Association will be *ultra vires* the Act itself, because a member has not been specifically granted such a right, unlike in the case of directors, the Registrar or an authorised officer of the Central Government. Section 36 (1) of the Act says that any such provision in the articles can be binding (as a contract between the company and its members) only subject to the provisions of the Act. It is not clear that Reg. 95 of Table A or like provision in the articles will not be legally repugnant to section 209.

However, it may be possible to argue that as such a right in favour of the members has not been expressly prohibited in any provision, Reg. 95 or a kindred provision in the company's articles can be said to satisfy the test of "vires." This can only be a slender justification, as the better rule of law in regard to specific rights seems to be that what has not been expressly granted must be taken to have been denied.

Be that as it may, in *Maharani's case*[4], the observation that "a shareholder has no such right (to inspect 'books of account') recognised by the Companies Act" can only be considered as *obiter* having regard to the general or statutory denial of this right. Their Lordships disposed of the appeal on an entirely different reasoning that a denial of the right of inspection of books of account was not an "act of oppression" under section 397. No contention was put forward in the arguments that there was a provision in the Articles similar to Reg. 95, or even if there was one, probably there was no followed-up action by a resolution of the Board of Directors or the company in general meeting previously defining specific books of account to which members can have access and that it was those books which were material to the case.

Register of Members.

As we are presently concerned with a member's rights, we shall first refer to the Register of members and the index of members, which are referred to in section 163 (1) of the Act. This section deals also with the Register of Debenture-holders and index of debenture-holders, and also copies of all annual returns prepared under sections 159 and 160, together with the copies of certificates and documents required to be annexed thereto under sections 160 and 161.

Sub-section (2) of section 163 states that except when the Register of members or debenture-holders is closed under the provisions of the Act, these documents aforesaid shall be open during business hours (subject to such reasonable restrictions, as the company may impose), so that not less than two hours in each day are allowed for inspection by (*a*) any member or debenture-holder without fee; and (*b*) any other person on payment of a fee of one rupee for each inspection.

And the next sub-section says that any such member, debenture-holder or other person, may (i) make extracts from any register, index or copy referred to in sub-section (1) without fee or additional fee, as the case may be; or (ii) re-

4. (1962) 32 Com. Cas. 207: 66 Cal. W.N. 63: A.I.R. 1962 Cal. 127.

quire any copy of such register index or copy of any part thereof, on payment of 37 paise for every 100 words or fractional part thereof required to be copied.

The other provisions in section 163 say that the company shall cause a copy to be sent to the member, as required by him within 10 days of his requisition. If any inspection, or the making of any extract from the document by the member during his inspection, is refused, or the copy is not sent within time the company and every officer of the company who is in default shall be punishable in respect of each offence with fine up to Rs. 50 for each day during which the refusal or default continues. The Court may also enforce these observances when suitable action is taken.

When shares are registered in the names of trustees as members, the beneficiaries are not entitled to inspect the documents or exercise rights which the trustees as shareholders can exercise In re. *Butt (deceased)*[5].

Copies of Memorandum

We shall now refer to other provisions in the Act regarding member's right to inspection, in the order followed by the Act.

Section 39 provides that a copy of each of the following documents shall be sent by the company to the member who may require them within 7 days, (*a*) the memorandum; (*b*) the articles, if any; (*c*) the agreement if anv, entered into or proposed to be entered into by the company with any persona ppointed or to be appointed as its managing agent or as its secretaries and treasurers; and (*d*) every other agreement and resolution referred to in section 192 if and in so far as they have not been embodied in the memorandum or articles. For defaulting, the company and every officer of the company in default are punishable with fine up to Rs. 50.

Register of Investments.

According to section 49 (7) where any shares or securities in which investments have been made by a company are not held by the company in its own name, the company shall keep a register containing all particulars regarding them. Sub-section (8) requires that this register shall be kept open to inspection of any member or debenture-holder of the company without charge, during business hours. The procedure as in section 163 is to be followed. For default, the company and every officer of the company in default are punishable with fine up to Rs. 5,000.

Copies of Trust Deed.

Section 118 requires that a copy of any trust deed for securing any issue of debentures shall be forwarded to the holder of any such debentures or any member, on request, within 7 days, on payment (*a*) in the case of printed trust-deed, of the sum of one rupee; and (*b*) if it is not a printed one, of 37 paise for every 100 words or fractional part thereof required to be copied. Default involves punishment to the company and every officer with fine up to Rs. 50 for each offence, with a further fine which may extend to Rs. 20 for every day during which the offence continues. The Court may also compel obedience. The trust deed shall also be open to inspection by any member or debenture-holder of the company in the same manner, to the same extent, and on payment of the same fees as if it were the register of members of the company. (*vide* section 163).

Register of charges

Under section 143 of the Act, every company shall keep at its registered office a

5. (1952) All E.R. 167.

register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or on any property giving certain details (enumerated) in each case. Under section 136 the company shall also cause a copy of every instrument creating a charge requiring registration with the Registrar to be kept at the registered office under section 144 (1), the copies of instruments creating charges kept in pursuance of section 136 and the register of charges kept in pursuance of section 143, shall be open during business hours (but subject to reasonable restrictions as the company in general meeting may impose, etc.) to the inspection of any member of the company without fee at the registered office of the company. If inspection is refused, the company, and every officer of the company becomes punishable with fine up to Rs. 50 and with further fine up to Rs. 20 for every day during which the refusal continues.

Foreign Register.

According to section 158 (1) a foreign register shall be deemed to be part of the company's register of members or of debenture-holders as the case may be (called 'principal register'). Such register shall be kept open for inspection and may be closed, and extracts may be taken therefrom and copies thereof may be required in the same manner, *mutatis mutandis,* as is applicable to the principal register under this Act, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the District where the foreign register is kept.

Inspection of Proxies

Section 176 (7) states that every member entitled to vote at a meeting of the company on any resolution to be moved thereat shall be entitled during the period beginning 24 hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged at any time during the business hours of the company provided not less than three days' notice in writing of the intention so to inspect is given to the company.

Copy of Resolution or Agreement.

Section 192 (1) requires that a copy of every resolution (together with a copy of the statement of material facts annexed under section 173 to the notice of the meeting in which the resolution was passed) or agreement to which this section applies shall within 30 days be filed with the Registrar.

Where articles have been registered, a copy of every such resolution referred to above which has the effect of altering the articles and a copy of every agreement referred to for the time being in force shall be embodied or annexed to every copy of the articles.

Where articles have not been registered, a printed copy of every resolution or agreement referred to in sub-section (1) shall be forwarded to any member at his request on payment of one rupee. Default in this respect makes the company and every officer in default punishable with fine up to Rs. 10 for each copy in respect of which the default is made.

Minute Books.

The books containing the minutes of the proceedings of any general meeting of a company are required to be kept at the registered office of the company by virtue of section 196 (1) of the Act. This register shall be open, during business hours, to the inspection of any member without charge, subject to such reasonable restrictions as the company may

by its articles or in general meeting impose, so however that not less than two hours in each day are allowed for inspection. Any member is also entitled to be furnished with a copy of the minutes within 7 days after his requisition, on payment of 37 paise for every 100 words or fractional part thereof. Default makes the company and every officer of the company liable to a maximum fine of Rs. 500 in respect of each offence. The Court may also enforce compliance by the company.

Balance Sheet

Section 219 makes it compulsory for the company to send a copy of every balance sheet (including the profit and loss account, the auditor's report and every other dcument required by law to be annexed or attached, as the case may be, to the balance sheet) which is to be laid before a company in general meeting, to be sent to every member of the company, to every holder of debentures issued by the company (not being debentures which *ex facie* are payable to the bearer thereof), to every trustee for the holders of any debentures issued by the company, whether such member, holder or trustee is or is not entitled to have notices of general meetings of the company sent to him, and to all persons other than such members, holders or trustees, being persons so entitled. This balance sheet with its annexures has to be sent not less than 21 days before the date of the meeting.

However if copies of all these documents are sent less than 21 days before the date of the meeting, they shall notwithstanding that fact be deemed to have been duly sent if so agreed to by all the members entitled to vote at the meeting.

A copy of these documents need not be sent in the following cases :—

(*a*) in the case of a company not having a share capital, to a member or holder of debentures of the company who is not entitled to have notices of general meetings of the company;

(*b*) to a member, or holder of debentures who is not entitled to have notices of the general meeting sent to him and of whose address the company is unaware ;

(*c*) to more than one of the joint-holders of any shares or debentures none of whom is entitled to have such notices sent to him ; and

(*d*) in the case of any joint-holders of any shares or debentures some of whom are and some of whom are not entitled to have such notices sent to them, to those who are not so entitled.

The above exemptions can be understood better if we know who are those who are entitled to get notice of the general meeting sent to them. They are, vide section 272 (2): (*i*) every member of the company ; (*ii*) persons entitled to a share in consequence of the death or insolvency of a member, and (*iii*) the auditor or auditors for the time being of the company. All other persons may, therefore, be taken to be not entitled to such notice. Sub-section (2) of section 219 further says that any member or holder of debentures of the company whether he is or he is not entitled to have copies of the company's balance sheet sent to him, shall, on demand be entitled to be furnished without charge of the documents mentioned aforesaid. So too, when any person, from whom the company has accepted a money deposit makes a demand, his request must be complied with but he shall pay a fee of one rupee. The company and every officer of the company who is in default is punishable with fine, for any default, up to Rs. 500. Section 219 applies to all companies, public or private. But an exemption is

provided in sub-section (5) concerning private companies as regards balance sheets laid before the commencement of the Companies Act, 1956, *i.e.*, 1st April, 1956.

In the case of a limited banking company, an insurance company or a deposit, provident or benefit society, they have to prepare a statement in Form F in Schedule I or in a form as near thereto as circumstances admit, before the company commences its business and also on the first Monday in February, and the first Monday in August every year during which it carries on business. See Section 223 (2) and (3). A copy of that statement, together with a copy of the latest audited balance sheet which was laid before the members of the company shall be displayed and until the display of the next following statement shall be kept displayed. Every member, every creditor of the company, shall be entitled, on payment of 50 paise to be furnished with a copy of this statement within 7 days of such payment. The company and every officer is liable to a fine up to Rs. 50 for every day during which the default continues. This provision does not apply to a Life Insurance Company or a Provident Fund Society if they conform to the requirements of the Insurance Act, 1938.

Auditor's report.

This report shall be read before the company in general meeting and shall be open to inspection by any member of the company. In practice, however, this is regarded as a mere formality, and the report, which is usually in stereotyped language as enjoined by section 227 (3) is taken as read by consent.

Other Rights.

We shall now deal with other important rights given to members under the Companies Act, 1956, for inspection : (*a*) the Register of contracts, companies and firms in which the directors are interested, (*b*) the contracts entered into by a company for the appointment of managerial personnel, (*c*) the Register of particulars concerning directors, managing agents etc., (*d*) The Register of Directors' shareholdings, (*e*) the Register of contracts between the company and its managing agents and their associates, (*f*) the Register of Loans and (*g*) the Register of Investments.

A. Register of Contracts.

According to section 301 (1), every company shall keep one or more registers in which shall be entered separately particulars of all contracts or arrangements to which section 297 or 299 applies. Now section 297 relates to contracts for the sale, purchase or supply of any goods, materials or services, or for the underwriting of any shares in, or debentures of, the company in which any of the directors are interested and for which the Board's sanction is required. Section 299 is regarding the disclosure of interests made by the directors.

The Register aforesaid under section 301 shall also specify, in relation to each director of the company, the names of the firms and bodies corporate of which notice (called "general notice") has been given by him under sub-section (3) of section 299. And this register shall be kept at the registered office of the company.

The above register shall—vide sub-section (5) of section 301—be open to inspection at such office, and extracts may be taken therefrom and copies thereof may also be required, by any member of the company to the same extent, in the same manner and on payment of the same fee as in the case of the register of members of the company, and the provi-

sions of section 163 shall apply accordingly (which we have already discussed). *See* paragraphs 19 to 22 *supra.*

It will be seen that the members have a right to inspect or take extracts or copies of only the entries in the Register under section 301 but have no direct access to the contracts or other documents referred to in sections 297 and 299. This is one of the instances in the Act to show that the members' right to inspection does not extend completely to all "books and papers" of the company including the books of account which are denied to them as we have seen already. (*See* paragraphs 13 and 14 *supra*).

B. Contracts for appointments.

However, certain original contracts themselves are allowed for inspection by the members. One such instance is the case of the contracts entered into by the company for the appointment of a manager, managing director, (Managing agent or Secretaries and Treasurers). These are kept at the registered office of the company and shall be open to inspection by any member of the company at such office. And extracts may be taken therefrom and copies thereof may be required by any such member, to the same extent in the same manner and on payment of the same fee, as in the case of the extract from the register of members of the company and the provisions of section 163 shall apply accordingly. *See* section 302. Sub-section (6) of this section makes it clear that not only the contracts in which any of the directors may be interested but all contracts relating to such appointments must be made available to the members for their inspection.

Sub-section (7) of the section 302 reads thus : "the provisions of this section shall apply in relation to any resolution of the Board of Directors of a company appointing a manager or a managing or wholetime director or varying any previous contract or resolution of the company relating to the appointment of a manager or a managing or wholetime director, as they apply in relation to any contract for the like purpose."

An Anomaly.

A commentator of the Companies Act (A. Ramaiya : A Guide to the Companies Act, 6th Edn., page 496,) has correctly interpreted the implication of the above provision thus :

"The purpose of this sub-section is that a resolution of the Board of Directors concerning the appointment or varying the terms of appointment of a manager or managing director or whole-time director should, for the purposes of the provisions of this section, be treated as amounting to a contract concerning such appointment or variation of the terms thereof.

If the resolution of the Board of Directors amounts to a contract by a legal fiction implied in the aforesaid sub-section and if the provisions of section 302, including sub-section (6) should apply to it, then this resolution must be open to inspection by the members. This section contemplates not the particulars of any appointment as may be recorded in a register maintained by the Company which too may be open to inspection (*see* the next two following sections), which are to be ascertained by inspection, but it is an inspection of the contract itself, which in this instance is the resolution of the Board. This in turn implies (unless there is also a separate deed of contract executed later in pursuance of the Board's resolution) that the members can inspect the resolution. Even if the Board's resolution itself is not the contract, that is the best evidence of an implied contract and there is no other document to evidence it. The best and most authentic record of the Board's resolution is the one contained

in the Minutes book of the Board Meetings, which can be inspected by the members. But can it be done ?

Now according to section 193 (3), "all appointments of officers made at any of the meetings aforesaid shall be included in the minutes of the meeting. This section refers both the minutes of the general meetings as well as the Board meetings. But in section 196 (1) it is clearly laid down that only the minute books of general meetings are open to inspection to members, and nothing is stated about inspection of the Board's minutes book.

Can this sub-section (7) of section 302 therefore, mean that the members can have access to the minutes book of the Board meetings, which is not otherwise open to them ? There is no provision too in section 302 that a register of such appointments with the particulars of the date of appointment, terms, etc., nor particularly the director's interests, if any, in those appointments has to be maintained separately for the purposes of offering inspection to members. The Registers under sections 303 and 304 are different and cannot serve the purpose of section 302.

C. Register of (Particulars of) Directors.

By virtue of section 303 (1) every company shall keep at its registered office a register of its directors, managing director, secretary, containing with respect to each of them certain particulars which are enumerated therein, for *e.g.*, present name and surname in full : any former name or surname in full : father's or husband's name and surname in full : usual residential address : nationality, business occupation : what office he holds in the company : the date of birth : and so on.

This register, section 304 says, shall be open to inspection by any member of the company without charge and of any other person on payment of one rupee for each inspection during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day are allotted for inspection.

If any such inspection is refused—(*a*) the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 50 and (*b*) the Court may, by order, compel an immediate inspection of the Register.

D. Register of Directors' Share-holdings.

Under section 307 (1) every company shall keep a register showing, as respects each director of the company, the number, description, and amount of any shares in or debentures of, the company or any other body corporate, being the company's subsidiary or holding company which are held by him, or in trust for him, or of which he has any right to become the holder whether on payment or not.

Sub-section (5) states that the said register shall subject to the provisions of this section, be kept at the registered office of the company and shall be open to inspection during business hours (subject to such reasonable restrictions as the company may, by its articles or in general meeting impose, so that not less than 2 hours in each day are allowed for inspection) as follows : During the period beginning 14 days before the date of the company's annual general meeting and ending 3 days after the date of its conclusion it shall be open to inspection by any member or holder of debentures of the company. In computing the 14 days and the 3 days mentioned in this sub-section, any day which is a Saturday, a Sunday or a Public holiday shall be disregarded.

The said register shall also be produced at the commencement of every annual

general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. If default is made the company and every officer in default shall be punishable with fine up to Rs. 500 *vide* sub-section (7).

E. Register of Contracts with Managing Agents or Associates.

Section 362 of the Act states that the registers referred to in sections 356 to 360 shall be open to inspection, and extracts may be taken therefrom and copies thereof may be required, by any member of the company, in the same manner, to the same extent and on payment of the same fees as in the case of the Register of members of the Company (*i.e.*, as in section 163).

But these sections 356 to 360 are no longer of any significance since the abolition of the institutions of Managing Agents and Secretaries and Treasurers with effect from 3rd April, 1970. I am not therefore commenting about this right of inspection by members according to section 362.

F. Register of (Particulars of) Loans.

According to sub-section (1-C) of section 370, every lending company shall keep a register showing the names of all bodies corporate under the same management as the lending company and the name of every firm in which a partner is a body corporate under the same management as the lending company, and some particulars (enumerated in this sub-section) in respect of every loan made, guarantee given or security provided by the lending company in relation to such body corporate. Sub-section (1-D) states that the particulars of every loan, guarantee or security referred in sub-section (1-C) shall be entered in the aforesaid register. But section (1-F) requires that the above register shall be kept at the registered office and shall be open to inspection at such office in the same manner as the register of members of the company can be inspected and the provisions of section 163 shall apply accordingly for taking extracts or copies from the register.

These provisions do not apply to certain companies or cases and exemptions as provided for banking and insurance companies, etc.

G. Register of Investments.

Sub-section (6) of section 372 makes it necessary for every investing company to keep a register of all investments made by it in shares of other body or bodies corporate (whether in the same group or not) showing in respect of each investment certain particulars as described in the same sub-section. This register can be inspected, just as the register of members, in accordance with the rules prescribed in section 163 and extracts can be taken or copies obtained by the members accordingly. Here too, the section does not apply to banking or insurance companies, etc.

There are provisions in section 549 of the Act regarding "Inspection of books and papers by creditors and contributories" at any time after the making of an order for the winding up of a company by or subject to the supervision of the Court if the rules prescribed by the Supreme Court so permit. Discussion on this is outside the scope of members' rights proper, which alone is the subject matter of this article.

[*To be continued*]

ON PRESUMPTION OF RULE OF EVIDENCE IN NEGOTIABLE INSTRUMENTS ACT

By

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Advocate.

It cannot be said that the presumptions of law laid down in different enactments are all of them wholesome or hold good for all time. At any rate, the presumption made in the Negotiable Instruments Act under section 118-A "that every Negotiable Instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration" might have been justifiable at its inception and for some time thereafter but not in all cases of transaction at the present day.

The presumption might have been enacted with intent to promote and facilitate mercantile transactions and business, but in its working in some special cases, it has wrought a good deal of hardship and havoc and injustice and coupled with the provisions of section 20 of the Act (about which I have alluded to at (1971) 1 M.L.J. 33 of the Journal section, its effects and out-come in many a case has been disastrous.

I refer to the promissory notes got executed in favour of uconscionable and usurious money lenders familiarly known as " Kabulees " found in the big cities of our country. Taking undue advantage of the presumption of law that every promissory note has a valid consideration the said creditors impose on their debtors generally the employees in big concerns, railways, and industries that the debtors should execute the promissory notes they take from them for twice, thrice or much larger sums than they actually lend out. Section 20 of the Negotiable Instruments Act enables them to plead that the amount shown in the promissory note is the one for which the debtor contracted for borrowing. The presumption of law again is in their favour that there was valid consideration. Against this armoury of two legal points in their favour in 90 cases out of 100 it is difficult for the poor debtor to prove his case however, true it might be or even if the judge is in sympathy with the wretched debtor.

Now, therefore, when very drastic changes in law have been made as in the Limitation Act, the Hindu Succession Act, etc., in fairness and justice to parties it is necessary and proper that some change should be introduced in the presumption of law regarding Negotiable Instruments to obviate injustice resulting in the name of law.

I would therefore suggest that an exception to the presumption be made by introducing a rider to the effect that the said presumption would not apply in cases where the creditor is a 'Kabulee' or some similar provision.

ADMISSION OF SIGNATURE AND ITS PROBATIVE IMPACT ON ONUS OF PROOF OF EXECUTION OF DOCUMENTS.

By

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In the actual practice of civil law, one is often confronted with probatory problems of practical importance, especially as regards the question relating to burden of proof. One such question, which is of some practical importance, may be found to arise, for instance, in a suit on a promissory note or a hand-note where the defendant, while admitting his signature or thumb-impression in the suit-document alleges that he put his signature or thumb impression on a blank piece of paper under specified circumstances, and that such paper has been utilised for the creation of the suit note. Whether such admission of signature or thumb impression be made in the pleadings or during the course of evidence, the question as to burden or onus of proof in such a case raises an interesting point of considerable importance.

The judicial decisions bearing on this question are not unanimous. One set of decisions lays down the view that mere admission of signature or thumb-impression does not in itself import an admission of execution, so as to dispense with proof of execution[1]. According to this view, notwithstanding the admission of signature or thumb-impression, the burden would still lie on the party relying on the document to prove the execution and also the passing of consideration. These decisions proceed on the basis that the term " execution " in relation to a written document means the placing by the executant of his signature or other identification mark such as a thumb-print thereon, in or accompanied then or later by circumstances which sufficiently demonstrate the intention of the executant to give effect and operation to the instrument signed by him[2], and that a mere admission of signature does not carry with it all the implications involved in due execution.

There is, however, another set of decisions laying down the contrary view, to the effect that where the defendant admits that the document on which the suit is brought bears his signature or thumb-impression, the onus of proof would be on the defendant to explain how the document bearing his signature or thumb impression came into existence.[3] According to this latter view, when a thumb impression or a signature that purports to have been put in a document in token of its execution is admitted by a person to be his, there arises a presumption that he must have executed that document.

So far as the Madras High Court is concerned , the recent judgment of Ismail, J., in *Nallaswami Gounder* v. *Rakkammal*[4], is in support of the latter view aforesaid, and places the onus on the defendant to prove the circumstances under which the signature or thumb impression was affixed on blank paper, and also to prove that no consideration passed under the document.

On a fair consideration of the relative merits of the two divergent views afore-

1. *Pirbhu Dayal* v. *Tula Ram*, A.I.R. 1922 All. 401; *Ramlakhan Singh* v. *Gog Singh*, A.I.R. 1931 Pat. 219; *Devidas* v. *Mamooji*, A.I.R. 1924 Nag. 103.

2. *Abdul Hasan* v. *Mt. Wajih-un-nissa*, A.I.R 1948 Pat. 186.

3. *Sahadeo Mauar v. Pulesar Nonia*, A.I.R. 1930 Pat. 598; *J.K. Shah* v. *Dulah Meah*, A.I.R. 1939 Rang. 334 (F.B.); *Jagmohan Misir* v. *Mendhai Dube*, A.I.R. 1932 All. 164; *Lakshmamma* v. *Jayaram*, A.I.R. 1952 Mys. 114.

4. S.A.No. 255 of 1970 (Unfortunately, this decision does not appear to have been reported so far).

said, it would appear that the latter view alone should prevail as stating the correct law on the point. It does not appear to be proper or correct to place the onus on the plaintiff to prove execution as also the passing of consideration, on the ground that admission of signature does not amount to admission of execution of document.

At the very outset, it is necessary to bear in mind that a distinction must be made between cases where "admission of execution" has to be proved as a fact, and cases where there is no such requirement. For example, on a question arising under section 35 (1) of the Registration Act, it has been rightly held in *Sayyapparaju Surayya* v. *Koduri Kondamma*[5], that if a man says that he signed a blank paper on the representation that it was required for presenting a petition, or if he signed a completed document on the representation that his signature or thumb-impression is required as an attesting witness, that admission of the signature or thumb impression in those circumstances cannot be construed to be an admission of the execution of the document ; and that far from its being an admission, it is a clear and unambiguous denial of the execution of the document. That decision is fully justifiable on the ground that in order to attract the provisions of section 35 (1) of the Registration Act, the law requires that there must be "admission of execution", and that a mere admission of signature on a paper on which the document is ultimately engrafted would not be sufficient compliance with the legal requirements. But it must be noted that "proof of execution" is not the same thing as "admission of execution". It is quite easy to conceive of a case where execution of a document is proved as against the executant, although he himself might not have admitted execution. It may also be mentioned at this juncture that the question as to shifting of onus by reason of the admission of signature or thumb-impression was neither raised nor decided in that case.[6]

It is no doubt true that the burden initially rests on the plaintiff who has to prove that the suit-note was executed by the defendant. But it cannot be said that in order to shift the onus to the defendant there must be a clear and unambiguous "admission of execution" by the defendant. It is now well-settled that the shifting of onus takes place as soon as a party adduces sufficient evidence to raise a presumption in his favour, and that the evidence required to shift the burden need not necessarily be direct evidence ; *i.e.*, oral or documentary evidence or admissions made by the opposite party ; but it may comprise circumstantial evidence or presumptions of law or fact[7]. Again, it must also be remembered that in order to determine on which of the two litigant parties the burden of proof lies, the proper test would be the one laid down in section 102 of the Evidence Act ; *viz.*, the burden of proof would lie on that person who would fail if no evidence at all were given on either side.

In view of the above discussion, it would be clear that the primary question for consideration would be whether any legal presumption could be said to arise in a case where the Court has before it a document which admittedly contains the signature or thumb-impression of the defendant. It is respectfully submitted that the above question requires to be considered in its two aspects.

5. (1949) 2 M.L.J. 684: A.I.R. 1950 Mad. 239: I.L.R. (1950) Mad. 709.

6. *Ibid.*

7. *Kundan Lal Rallaram* v. *Custodian, Evacuee Property*, (1963) 1 M.L.J. (S.C.) 85: (1963) 1 An. W.R. (S.C.) 85 : A.I.R. 1961 S.C. 1316: (1963) 1 S.C.J. 347.

In the first place, there is the presumption in law as to normal course of human conduct. From the fact that an admitted thumb impression or signature of a person is found appended to a document so as to ostensibly evidence its execution, it is open to the Court to presume that the person could have affixed his signature or thumb-impression for the purpose of executing the document. Having regard to the normal course of human conduct , such a presumption would inevitably arise. Since fraud or misrepresentation cannot be a matter of presumption, but is subject to strict proof, it would be necessary to draw a presumption of execution as against the defendant, and call upon him to prove his case in rebuttal thereof.

Secondly, the law also presumes a legal origin as regards existing facts. The rule of presumption as to legitimacy enunciated in section 112 of the Evidence Act, and the presumption arising under illustration (*i*) to section 114, are founded on this principle. Thus, a child born during the continuance of a valid marriage between his mother and any man, cannot be presumed to be illegitimate. Nor can there be a presumption that a document creating an obligation which is found in the hands of the obligor must have been stolen. It is because, in the absence of any evidence on either side, the law always tends to trace a legal origin for existing facts. Again, the presumption as to title, on the strength of continued possession and in the absence of any other satisfactory evidence, also arises on the basis of a presumed grant ; the presumption being drawn by the Court while ascribing a legal origin to such possession.[8] Similarly, in the case of a document admittedly containing the signature or thumb impression of the defendant, it is submitted that the Court should lean towards tracing a legal origin for that signature or thumb impression in due execution, and cannot presume a fabrication.

From what has been stated above, it would be clear that when a signature or thumb-impression in a document is admitted by a person to be his, and it purports to be in token of execution of the document by him, then a presumption would necessarily arise that he must have executed it. Having thus raised the presumption as to execution, the recital in the document as to passing of consideration can only be construed as constituting a *prima facie* admission by the executant. The presumption aforesaid being rebuttable, the onus or burden would only be on the ostensible executant to prove that he affixed his thumb-impression or signature on a blank paper, and that consideration did not pass under the document. If he fails to prove his case, then the presumption would be against him.

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8. *Manohar Das Mohanta* v. *Charu Chandra Pal*, A.I.R. 1955 S.C. 228 : 1955 S.C.J. 114 : (1955) 1 S.C.R. 1168.

A DISCUSSION ON SOLOMON AND OTHERS *v.* MUTHIAH AND OTHERS.[1]

By

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In the above case *Solomon and others* v. *Muthiah and others*[1], Ismail, J. has interpreted section 29 (1) and (2) of Indian Succession Act and its applicability in erstwhile Travancore State now forming part of the State of Tamilnadu) to Syrian Christians. The learned Judge has held that the Travancore Christian Succession Regulation II of 1092 stood repealed with effect from 1st April, 1951, by reason of section 6 of Part "B" States (Law) Act, 1951 (Central Act III of 1951). The learned Judge has referred to the decision of the Travancore-Cochin High Court in *Kurian Agusty* v. *Devassy Aley*[2], which held that "Even if Travancore formed part of former British India, Part V of Indian Succession Act, would not apply to Christians in Travancore, who were governed by the Travancore Christian Succession Act" and has expressed his respectful dissent from it. The learned Judge has also dissented from *Nabujan* v. *Paushimoni*[3], and *Perm Chand* v. *Lilawati*[4], and observes thus : at (1974) 1 M.L.J. 53 at 59:

"With very great respect to the learned Judges who decided that case, I am unable to agree with their reasoning or with their conclusion. The first reasoning appears to be that section 29 (2) of the Indian Succession Act, 1925, saves all existing law or custom having the force of law relating to intestate succession. Such an effect cannot flow from section 29 (2) of the Indian Succession Act, 1925. On the other hand the language of section 29 (2) of the said Act, in my opinion, makes it absolutely clear that the provisions contained in Part V of the Act are of universal applicability, unless that applicability has been excluded either expressly or by necessary implication by any other law for the time being in force. The expression "save as provided in sub-section (1) or by any other law for the time being in force" occurring in sub-section (2) of section 29 of the Indian Succession Act, 1925, has to be construed in the context of the provisions contained in section 29 (1) and the principal clause in sub-section (2) itself.

Section 29 (1) excludes the applicability of that part to any intestacy occurring before the first day of January, 1866. It equally excludes the applicability of that Part to the property of any Hindu, Muhamadan, Buddhist, Sikh or Jaina, irrespective of the date of occurrence of the intestacy. Sub-section (2) uses the expression, "save as provided in sub-section (1) or by any other law for the time being in force."

The expression, "save as provided in sub-section 1" specifically refers to the exclusion of the applicability of the provisions of Part V provided for in sub-section (1). Equally, the expression "save as provided by any other law for the time being in force" must necessarily refer to the exclusion of Part V made by any other law. In other words, so long as any other law for the time being in force has not provided for the exclusion of the applicability of Part V, Part V will apply. If the intention of the Legislature was to save the custom or any other law relating to intestacy, the language of section 29 (2)

1. (1974) 1 M.L.J. 53.
2. A.I.R. 1957 Tr.-C. 1 : (1956) K.L.T. 559.
3. 54 Cal.W.N. 2 D. R. 14.
4. A.I.R. 1956 Him. Pra. 17.

would have been entirely different. On the other hand, from the language of section 29 (2) and the context and setting in which it occurs, it is capable of leading only to one conclusion namely, that the provisions of Part V are of universal application except in so far as that application has been excluded by sub-section (1) or any other law for the time being in force. The mere fact that there is a custom relating to intestate succession or there is some other law dealing with intestate succession will not lead to the exclusion of the applicability of the provisions of Part V of the Indian Succession Act, 1925. From the very nature of the case, a custom cannot exclude the applicability of the provisions of a particular statute. But a statute can do it. So long as an existing statute has not excluded the applicability of Part V of the Indian Succession Act, 1925, the provisions of the said Part V will apply. Therefore, in my opinion, there is no warrant for holding that section 29 (2) of the Indian Succession Act, 1925, saves an existing custom or existing law relating to intestacy."

It is unfortunate that in a matter of considerable importance in relation to succession of Indian Christians, who form a considerable portion of the population of Nagercoil and other places in Kanyakumari District, a single Judge of the Tamil Nadu High Court has expressed an opinion contrary to that of a Bench decision of the Kerala High Court thereby affecting a large class of persons, within the State of Tamil Nadu, on such a matter, as intestate succession and without the benefit of any arguments on behalf of the respondent. The decision of Ismail, J. suffers from several infirmities both in the reasoning adopted and in the conclusion arrived at by the learned Judge in his interpretation of section 29 (1) and (2) of Succession Act, which does not appear to be correct, in its context or situation. His interpretation of section 6 of Part "B" States Act (Laws) Act, 1951 (Central Act III of 1950) also equally calls for reconsideration, in the light of the following discussion on the subject.

Firstly, it may be noted that the Indian Succession Act (Central Act XXXIX of 1925) is only a Consolidating Act and not an Amending Act. In fact, the framers of the Act stated: "The object of this bill is to consolidate the Indian law relating to succession. The separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is therefore every justification for an attempt to consolidate it. The bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made". (*See* Statement of objects and reasons, Gazette of India, dated 4th August, 1923, p. 5, p. 401). Therefore the *raison d'etat* of the decision of the learned Judges of Kerala High Court in *Kurian Augusty* v. *Devassy Aley*[5] is supported by the preamble to the enactment itself. It cannot be said that the Indian Christians, be they Syrian Christians or others, living in the erstwhile Travancore-Cochin State would cease to be governed by the Travancore Christian Succession Regulation II of 1902 and that their personal laws would get altered or amended or changes brought about therein by enforcement of the Indian Succession Act, 1925, merely because of the passing of Part "B" States (Laws) Act, the Central Act (III of 1951). That was neither the intention nor the scope and not even the object of Central Act III of 1951 as interpreted by several decisions of the Supreme

5. (1956) K.L.T. 559 : A.I.R. 1957 T.C. 1.

Court of India. That law was not brought into force for effecting sweeping changes in the law of Intestate Succession.

The scope of section 29 (2) has been recently considered by Moidu, J., in *Mary* (alias) *Kunjamma* v. *Eliyamma*[6], Dealing with the Travancore Christian Succession Act (1097 M.E.). Moidu, J. observes thns : "If the Travancore Christian Succession Act can be regarded as law in force", as in section 29 (2) of the Indian Succession Act, relating to intestate succession of Christians in Travancore, then that law is saved under section 29 (2). It is clear from section 29 (2) that the provisions of the Act do not apply to partition of the properties of the communities referred to in Part V, which have their own laws relating to intestate succession. *There cannot therefore be any dispute that the Travancore Christian Act is saved by section* 29 (2) *of the Indian Succession Act*"[6-7] (Italics supplied).

Be it the Travancore Christian Succession Act (M.E. 1097) or Regulation of 1092, the juridical principle remains the same and the view expressed by Moidu, J. in *Kunjammal's case*[6-7], appears to be correct and sound.

Let us examine section 29 of the Indian Succession Act (XXXI of 1925) which runs as follows:

Part V Intestate Succession: "This part shall not apply to any intestacy occurring before the first day of January, 1866 of the property of any Hindu, Muhammadan, Budhist, Sikh or Jaina.

Chapter I, Application of Parts 1 *and* 2—Save as provided in sub-section (1) or by any law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy."

One cannot fail to note that the law of intestate succeession, among the various sections of the Indian Christians in Travancore was vague and unsettled and in view of the High Court's complaint about the unsatisfactory state of law among the Christians and repeated representations made on their behalf and the necessity for legislation being keenly felt, the bill was drafted on the lines of the Indian Succession Act, with such alterations as were considered necessary in the interests of various sections of Indian Christians in Travancore. Reference may be made in this connection to Regulations and Proclamations of Travancore Government of Travancore[8]. Section 2 of the Regulations runs thus "Except as provided in this Regulation or by any other law for the time being in force, the rules herein contained shall constitute *the law of Travancore applicable to all cases of intestate succession among the members of Indian Christian community*". So that the Travancore Christian Succession Regulation II of 1902 was an existing law, and it was saved by Article 372 of the Constitution of India and remains unaffected by virtue of Article 254; so the argument that, as from 1st April, 1961, the date of enforcement of part "B" States (Laws) Act, the Regulation II of 1092 stood repealed and cannot be sustained. Similar is the view expressed by the Supreme Court of India in *Patankar* v. *C. G. Sastry*[9], (wherein the Mysore Rent Control Act was held to be saved as an existing law) *See also P.P. Kutti Keya* v. *The State of Madras* (*Madras Commercial Crops Act*)[10], *The Indian Chemical and Pharmaceutical Works, Hyderabad* v. *The State of Andhra Pradesh*[11]. The

6-7. (1973) K.L.T. 728.

7. (1973) K.L.T. 728.
8. (1928) Vol. IV, 300.
9. (1961) 1 S.C.J. 221 : (1961) 1 S.C.R. 591 : A.I.R. 1961 S.C. 272.
10. (1954) 1 M.L.J. 117. A.I.R. 1954 Mad. 621.
11. (1967) 1 S.C.J. 406 : (1966) 2 S.C.R. 110 : (1967) 1 M.L.J. (S.C.) 69 : (1967) 1 An.W.R. (S.C.) 69 : A.I.R. 1966 S.C. 713.

Travancore Christian Succession Regulation II (M.E. 1092) is an existing law, as defined in Article 366 (10) and it is saved by the provisions of Article 372. (See also *Superintendent and Legal Remembrancer, West Bengal* v. *Union of India*[12], as to what is meant by " Existing Law. "

Further, it cannot be said that the Indian Christian Succession Regulation (II of 1092) is a law, corresponding with the provisions, contained in Part V of the Indian Succession Act, 1925, so far as Indian Christians are concerned. This basic assumption on the part of the learned Judge cannot be accepted as correct. One can usefully refer in this connection to two important pronouncement of the Supreme Court of India in *Union of India* v. *Abdul Jalil*[13], and the *Anand Prasad Lakshmi Nivas Ganeriwal* v. *The State of Andhra Pradesh and others*[14], wherein the scope and effect of section 4 proviso to Part "C" States (Laws) Act and that of Part "B" States (Laws) Act 1951 section 6 are discussed respectively. In the light of the above pronouncements, it can be stated that the Travancore Christian Succession Regulation II of 1092 contains provisions, not corresponding with the Indian Succession Act in relation to intestate Succession of Syrian Christians. Although it is in *pari materia* with the Indian Succession Act; it differs from it, in material particulars and with respect to classes of heirs; and its applicability remains unaffected by the Part "B" States (Laws) Act, 1951 (Central Act III of 1951) providing for extension of certain laws to part "B" States.

What are enactments in *pari materia* has been considered in *J. K. Steel and Company* v. *Union of India*[15], In the view expressed by the Supreme Court, it may be taken that the Travancore Christian Succession Act or Regulation cannot be regarded as law, corresponding to Part V, Indian Succession Act; but both are legislations, which are in *pari materia*. "They form one code. They must be taken together, as forming one system and as interpreting and enforcing each other"[15].

The doctrine of 'implied repeal' was considered recently by a Full Bench of the Andhra Pradesh High Court in *Puthana Appa Rao* v. *State of Andhra Pradesh*[16]. It refers to the principle of curtailment without repeal. If a subsequent statute merely creates an exemption or exceptions from the operation of a previous statute or modified its operation by the annexation of conditions, the previous statute is not necessarily repealed and the prior enactment may be rendered in-operative without being actually repealed; the confllict between the two statutes, though apparent, their objects are different. Yet the language of each in these circumstances would be restricted to its object[16].

The well-known legal maxim "*generalia specialibus non-derogant*" will also be applicable to the case and the Indian Christian Succession Regulation (II of 1092) will prevail over the provisions of Indian Succession Act.

In this connection it is useful to refer to the decision in *Kamalakshy* v. *Narayani*[17], wherein Raghavan, J. observed as follows :

12. (1967) 2 S.C.R. 170· A.I.R. 1967 S.C. 997
13. (1965) M.L.J. (Crl) 303: (1965) S.C.D. 76. (1965) 1 S.C.J. 617 : A.I.R. 1965 S.C. 147.
14. (1964) 1 S.C.J. 615 : (1964) 2 M.L.J. (S.C) 1 : (1964) 2 An.W.R. (S.C.) 1 : A.I.R. 1963 S.C. 853.
15. (1970) 1 S.C.J. 829: (1969) 2 S.C.R. 481 : A.I.R. 1970 S.C. 1173.
16. (1971) 1 An.W.R. 164 : (1970) 2 An.L.T. 154 : A.I.R. 1970 A.P. 318 : I.L.R. (1971) A.P. 656 (F.B.)
17. A.I.R. 1968 Ker. 123 · (1967) Ker.L.T. 1051. (1967) K.L.J. 671 : I.L.R. (1967) 2 Ker. 268 : (1967) K.L.R. 840.

"Justice, equity and good conscience in the matter of succession may differ from community to community. What is justice, equity and good conscience for the Hindu may not be justice, equity and good conscience for the Muslim in the field of their personal laws. Therefore, the principles of justice equity and good conscience embodied in statutes like the Indian Succession Act and the Transfer of Property Act, should not be applied to all communities alike in so far as their personal laws are concerned". *Parambarathil Patukkayil Chakkutti* v. *K. Chandukutti*[18].

In this connection, it is pertinent to refer to the decision of Tyabji and Spencer, JJ. in *Kunhambi* v. *Kalanthar*[19], where the law applicable to Mappillas of North Malabar came to be considered. The learned Judges referred to section 16 of the Madras Civil Courts Act, which lays down "where in any suit, or proceeding, it is necessary for any Court under this Act to decide any question regarding *succession, inheritance*, marriage or caste, or any religious usage or institution (*a*) Mohammadan Law in cases where the parties are Mohammadans and the Hindu Law in cases where the parties are Hindu, or (*b*) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision".

The Madras Act expressly mentions customs and usages as capable of being enforced by Civil Courts and in this respect it was pointed out by the Judges, that it differs from Civil Courts Act for Bengal, the United Provinces and Assam Act (XII of 1887) section 37 of which does not refers to customs and usages. Tyabji, J. refers to the decision of the Privy Council, *Mohammed Ismail Khan* v. *Lala Sheomuk Rai*[20], wherein the Privy Council reversed the decision of the Allahabad High Court and remanded the case to enable the parties to file evidence with respect to issue No. 3, as to family custom although the Courts in India had held that it was not permissible for the parties to adduce any evidence of custom, varying the strict Mohammadan Law on account of the fact that custom and usage were not found in section 37 of Act XII of 1887.

Tyabji and Spencer, JJ. made reference to the judgment of Sir Erskine Perry, C.J. of the Supreme Court of Bombay in *Hirbae* v. *Sonabai* (*Khojahs and Memons case*)[21]. Sir Erskine Perry, J., considered the principle underlying the rule of law that should govern the rights of the parties at page 116; and laid down, in effect, that in the rules that are included in the body of law, to which any class of persons are subject, various considerations render customs peculiarly important. He observed "In every well-ordered Community it is essential to its peace that clear and certain rules should exist, as to the various relations of domestic life and in every early history, it will be found that as to most of these, such as marriage, succession, adoptions, as well as to the various occupations, agricultural, pastoral or mercantile, which may happen to prevail in such society, the exigencies of men have framed rules, long before written law existed. A considerable body of law thus arises in every State and the legislator, when he is required to enter upon his task, rarely seeks to interfere with regulations which the habits and manners of the people have spontaneously adopted".

In the words of Austin, "The prevalence of a custom amongst the governed may determine the sovereign or some political superior in subjection to the sovereign,

18. 53 M.L.J. 368: A.I.R. 1927 Mad. 877.
19. (1914) 27 M.L.J. 156: I.L.R. 38 Mad 1052.
20. (1902) 17 Cal.W.N. 97.

21. (1847) Perr. O.C. 110; (S.C.): 2 Morley's Digest 431 at 435.

to transmute the custom into positive law. He concludes that the policy leading to such enactments as the charters of the High Courts, and the Civil Courts Act "proceeded upon the broad, easily recognizable basis of allowing the newly conquered people to retain their domestic usages. The main object was to retain to the whole people lately conquered their ancient usages and law on the principles of *Uti possidentis*". This is the principle recognised in Private International Law and the principle adopted for merger of territories, as well.

Waller and Madhavan Nair, JJ. have referred to the same principle in applying the customary laws of succession to the Thiyyas of Malabar in *Chakkutti* v. *Chandukutti*[22]. They refer to the expression "Any custom having the force of law" and observe that it is wide enough to include customary law which governs the community to which the Act (Madras Act III of 1873) applies. They also refer to the Privy Council decision in *Janindra* v. *Rajendra*[23], wherein it was held that the adoption law prevalent among the Hindus was not prevalent as a family custom in a particular family. In this connection one may also refer to an instructive judgment of Chief Justice Rajamannar and Panchapakesa Iyer, J., in *Abdulrahiman* v. *Ayoma*[24], where the learned Judges held that section 16 of the Madras Civil Courts Act continues to be applicable, despite the Muslim Personal Law (Shariat) Application (Madras Amendment) Act, 1949 (XVIII of 1949) to Mappila Tarwads. They held that the Shariat Act (XXVI of 1937) including the Madras Amendment did not purport to, nor did it abolish the rights and incidents of a Mappila Marumakkathayam Tarwad. They observed as follows:

"If there is one thing clear in the language of section 2 of the Central Shariat Act and section 2 of Madras Amending Act of 1949, it is that neither enactment purported to make Muslim personal Law applicable to all matters relating to Muslims nor did it in terms totally abrogate custom and usage in respect of matters other than those enumerated in sections 2 and 3 of the Central Act and section 2 of the Local Act."

The learned Judges expressly dissented from Basheer Ahmed Sayeed, J.'s decision in *Ayisumma* v. *Mamotty Umma*[25].

What Rajamannar, C.J. said in regard to the applicability of the Shariat Act to the Mappilas will apply *pro tanto* in regard to the applicability of the Indian Succession Act to the Indian Christians of Nagercoil. The view of Ismail, J., runs contrary to the principles laid down in the above Bench decisions of the Madras High Court and it overlooks the provisions of section 16 of the Madras Civil Courts Act. (Madras Act III of 1873).

Viewed in the light of the Bench Rulings of the Madras High Court and in the context of Madras Civil Courts Act III of 1873, one can appreciate the scheme underlying the promulgation of the Travancore Christian Succession. Regulation II of (Malayalam Era 1092). The framers of the Regulation clearly pointed out that the peculiar customary laws, prevailing among that community have been taken into consideration, in so far as they vary from or differ from the Indian Succession Act. Justice Ismail has not dealt with the scope and applicability and operation of customary law in the light of the above decision. Merely the historic fact that Travancore-Cochin merged into the

22. (1927) 53 M.L.J. 368 : A.I.R. 1927 Mad. 877.
23. (1885) I.L.R. 11 Cal. 463 : 12 I.A. 72.
24. 69 L.W. 66: I.L.R. 1956 Mad. 903: (1956) 1 M.L.J. 119 : A.I.R. 1956 Mad. 244.
25. (1952) 2 M.L.J. 933 : A.I.R. 1953 Mad. 425.

Union of India and formed Part 'B' State and that the Central Act III of 1951 has been extended has weighed with the learned Judge and not the legal effect of the incidents of customary laws of succession prevailing therein.

One can claim that the Central Act III of 1951 did not expressly or impliedly abrogate the customary laws. One can also refer in this connection to the Tamil Nadu Acts. The Madras (Transferred Territory) Extension of Laws Act XXII of 1957; Act XXIII of 1960; Act XXII of 1965;—Civil Court Manual (Madras Acts) Vol. IV, pages 4375 to 4392 (M.L.J.) Edition, passed by the Tamil Nadu Legislature after the merger of Kanyakumari District and Shencottah Taluk with Tamil Nadu. There is no indication whatsoever in these Acts that the customary law of succession among the Syrian Christians residing at Nagercoil (as found expression in the Travancore Christian Succession Regulation Act II of 1092 (M.E.) stood abrogated.) On the other hand the expression 'corresponding law' found in section 6 of Part B States Extension of Laws Act (Central Act III of 1951) and the same expression used in Tamil Nadu Acts referred to above do not justify the conclusion that the Indian Succession Act, 1925 and the Indian Christian Regulation II of 1092 (M.E.) can be styled as corresponding laws. Legislative enactments have interpreted the terms "corresponding Acts" to mean and include Acts, which are same or identical. Both the Acts, Regulation II of 1092 (M.E.) and Indian Succession Act (Central Act XXXIX of 1925) deal with the same subject "Succession" but they are not same or identical regarding their provisions.

One can also add that the criticism of *Kurian Augusty* v. *Devassy Aley*[1], made by Ismail, J., is not well-founded and is not sound. It cannot be said that the meaning of the expression "Corresponding Law" found in section 6 of the Central Act III of 1951 and the expression "the law in force" found in section 29 (2) of the Indian Succession Act (XXXIX of 1925) are the same. The existing law is defined in Article 366 (10) of the Constitution of India and it is saved by Article 372 of the Constitution of India. That is what section 29 (2) of Indian Succession attempts to do in regard to "Law in force" and as interpreted in section 16 of Madras Civil Courts Act, it will include customary law as well. The view of Moidu, J., in *Kunjammal's case*[2], appears to be the correct view while the decision in *Solomon's case*[3], does not appear to be sound either on principle or on the authorities, discussed above.

It is submitted that several difficulties will arise if the interpretation adopted in *Solomon* v. *Muthiah*[3], is to prevail. The problem arising in *Solomon's case*[3], can also be better illustrated thus:

" Suppose *A* dies leaving property both within the State of Travancore-Cochin as well as within the State of Tamil Nadu and he dies at Quilon, what is the law applicable in the matter of intestate succession to the estate of *A*? Is it the Travancore Christian Regulation or is it the Indian Succession Act so far as the properties situate in Tamil Nadu are concerned? Suppose *A* dies at Nagercoil, will the law of intestate-succession change?" (*Vice versa*)

These are problems which arise for consideration in view of *Solomon's case*[3]. The law laid down in *Solomon's case*[3], has created a confusing situation. It will be the duty of the Legislatures to declare

1. A.I.R. 1957 Tr-Co. 1 (D.B.): 1956) K.L.T. 559.

2. (1973) Ker.L.T. 728.

3. (1974) 1 M.L.J. 53.

the law in accordance with the customary usage and the mode of succession hitherto followed by different communities and help the people avoid unnecessary litigation in the matter of succession. Conflicting decisions and competing claims will arise, if different Acts are made applicable in both the States for the same community in the matter of succession.

It will be a mockery of our system of laws, if one is to be told that the law of intestate succession for an Indian Christian at Travancore-Cochin State is the Travancore Christian Succession Act (1097 M.E.) or Regulation II of 1092, but that same Syrian Christian, if he migrates to Nagercoil the law will change to Indian Succession Act, 1925 (*vice versa*) This situation will be quite anamalous and even estate duty cannot be levied on a proper basis:

It is hoped that the Governments of India and the State of Tamil Nadu will take suitable steps for making necessary and appropriate amendments to the Indian Succession Act or issue a notification under section 3 thereof, exempting the Syrian Christians from the scope and applicability of the Act (Act XXXIX of 1925) so that their customary law of Murumakkathayam continues and remains unchanged, in respect of Intestate Succession.

NOTE ON INSURER'S LIABILITY WITH REFERENCE TO DRIVER'S LICENCE.

By

C. RAGHUNATHA REDDY, *Advocate*.

Under section 96 of the Motor Vehicles Act, an Insurer is at liberty to take up a defence avoiding his liability, if it was so laid down as a condition in the Policy that the vehicle should not be driven by a person unless he was duly licensed at the time of driving.

It is therefore laid down in all the Policies as a condition that "the person driving holds a licence to drive .... or has held and is not disqualified for holding or obtaining such a licence."

'The person driving holds a licence to drive' is a clause free from any ambiguity whatever. But the next clause, namely, 'has held and is not disqualified for holding or obtaining such a licence' is apparently ambiguous. Does it mean that if a person is not disqualified, he can drive without a licence, if he had at one time held a licence in the past ? No. For if that is the meaning, the Insurer is specifically giving permission to do what the Motor Vehicles Act under sections 3 and 5 forbids a driver and an owner to do. It is 'forbidden by law' and therefore comes under the ban of section 23 of the Indian Contract Act. If the Policy is silent on unlicensed driving, that is a different matter. But if it specifically gives permission to do what is forbidden by law, then it is banned by section 23 of the Indian Contract Act.

What then does the clause really mean ?

Section 3 of the Motor Vehicles Act says, "No person shall drive a motor vehicle ...... unless he holds an *effective* driving licence ...." (italics supplied). Section 10 says, "A driving licence issued or renewed under this Act shall, ..., be effective without renewal for a period of three years only ......", and further lays down, that "the driving licence shall be deemed to continue to be effective for a period of thirty days after the date of its expiry". Under the first part of section 10, the driving licence is *ipso facto* effective for three years, while under the second part, it is deemed to be effective for thirty days more. Thus by fiction of law, the life of three years is extended by thirty days.

It follows from sections 3 and 10, that a person holds an effective driving licence for three years and thirty days, from the date of its issue or its renewal. We are not now concerned with the issue of a licence, for the Policy speaks of a person who 'has held' a licence. The Policy refers to renewal of a licence. What therefore is the position of a person between the date of application for renewal and the actual renewal of the licence by the Authority ? To take an example : A person's driving licence expires on 31st of March. He applies for renewal on 30th of April, and the Authority actually renews it on 7th of May. Applying section 10 to the example, the person does not hold a licence from 1st to 6th of May. But, by the application of section 11, the defect is cured by the retrospective effect of the renewal (It should also be noted that renewal is not automatic, foı it is subject to medical fitness). Therefore, until the defect is cured, the person does not hold a licence, but he has held a licence and is waiting for actual renewal. Once it is renewed, the renewal is retrospective, and he holds a licence. During the period between application for renewal and actual renewal, the person can drive, for he has held a licence which has been submitted for renewal. But during the same period, if there is an order of disqualification, he cannot drive even if he has held a licence. This is what the

clause in the Policy means to say. The clause, " has held and is not disqualified", must be read conjunctively and not disjunctively.

The case of disqualification when a person actually holds a licence does not present any difficulty, for in that case he ceases to hold an effective licence under section 18 (1) of the Act.

Independent of the Policy, a driver shall hold an effective licence when driving, as laid down by section 3 of the Act. However skilful a driver may be, he is qualified to drive only if he holds an effective licence. Ability to drive does not mean qualification to drive, just as possession of knowledge to pass B.A. does not mean that a person is so qualified. Therefore, absence of disqualification cannot be equated with qualification to drive. If a person is not disqualified, it does not automatically mean that he is qualified to drive.

The Insurer can avoid his liability if at the time of the accident the vehicle was driven by a person without an effective licence.

BOOK REVIEW.

I. MODERN HINDU LAW *by* Dr. Paras Diwan. Second Edition, 1974. (Publishers: Allahabad Law Agency, Allahabad). Price Rs. 20.

In this edition, the law is stated as it was on 1st October, 1973. The author has dealt with the subject in a spirit of constructive criticism. The subject is covered in about 500 pages thus constituting a relatively concise book. It is designed to benefit both lawyers and students. The texts of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoptions and Maintenance Act, 1956, the Dowry Prohibition Act, 1961, the Child Marriage Restraint Act, 1929, and the Hindu Widows Remarriage Act, 1856 are set out in the Appendix. Inclusion of the text of the Special Marriage Act of 1954, would have been even more helpful as two Hindus as such can marry under that Act also, though by way of civil marriage. The view expressed on page 86 that the Hindu Marriage Act does not make consent a pre-condition of marriage is somewhat debatable. The provision in section 12 (*c*) that a marriage is voidable if consent was obtained by force or fraud would seem to suggest that obtaining of consent is contemplated by the Act. Appropos of the requirement as to ceremonies the decision in *Smt. Shakuntala* v. *Nilkanth*, 1973 Mah. L.J. 310, holding that where the parties were Hindus at the time of the marriage, solemnisation observing Buddhist rites would render the marriage invalid despite Buddhists being within the extended definition of "Hindu" under the Act, could have been noticed. The question whether an unmarried daughter who takes a share in her father's estate is entitled to claim a provision for her marriage expenses separately, answered in the negative in cases like *Nalla Lalithamba* v. *Yalle Venkatalaxmi*, (1970) 1 An.W.R. 245 does not seem to have been noticed.

The author has not hesitated to criticise strongly the view expressed by the Supreme Court in *Sawan Ram's case*, A.I.R. 1967 S.C. 1761 and *Sita Bai's case*, A.I.R. 1970 S.C. 343 resuscitating the doctrine of "relation back" in regard to an adoption by a widow as resulting from an obsession that adoption completely and finally transplants the child in the adoptive family creating all ties as if the child is a natural born child in the family and that a widow's family is the husband's family (page 214). It is gratifying that the author has given a coherent picture of the whole spectrum of Hindu law—codified as well as uncodified. The book will undoubtedly be highly helpful to students as well as lawyers.

II. JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS *by* S.N. Ray, 1974. (Publishers: Eastern Law House, Calcutta). Price Rs. 32.

It has been said: "If Judges want to be preachers they should dedicate themselves to the pulpit; if Judges want to be primary shapers of policy the Legislature is their place. Self-willed Judges are the least defensible offenders of Government under law" (Justice Frankfurter, Government under Law, P. 31). In a different context, Lord Denning observed: "We sit here to find out the intention of Parliament......and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis". The crux of judicial review lies in the Court operating as a creative force than as a brake on the wheels of progress. On the occasion of the inaugural sitting of the Supreme Court on 28th January, 1950, Shri M.C. Setalvad indicated the ends to be served by judicial review *vis-a-vis* Fundamental Rights when he said: "The detailed enumeration of fundamental rights in the Constitution and the provisions which enable them to be reasonably restricted will need wise and discriminating decisions. On the Court will fall the delicate and difficult task of ensuring to the citizen the enjoyment of his guaranteed rights consistent with the rights of society and the State" (1950) 1 S.C.R. 4. The book under review based on the author's doctoral dissertation seeks to find out to what extent the Supreme Court's exercise of the power of judicial review of Parliamentary enactments has

succeeded in harmonising and reconciling the seemingly conflicting provisions affording protection to fundamental rights and its goal of building up a welfare State.

In adopting the comparative method of study for the purpose, the author has leaned heavily on American decisions. At the same time he has shown awareness that the scope of judicial review under the American and Indian systems is not identical, that judicial review in the U.S. is 'inferred' rather than 'conferred' unlike in India, that while 'due process' is the touchstone of the validity of legislation in U.S. conformity to ' procedure prescribed by law' is the relevant criterion in this country, and that the factors that fostered the growth of judicial supremacy in the U.S. are either absent or are not so much prominent in the Indian constitutional system.

The exercise of the power of judicial review by the Supreme Curt during the last 25 years has been marked by shifting attitudes and approaches—'judicial self-restraint' on some occasions and 'judicial activism' on some other occasions. Nor have the pronouncements of the Court in the matter of State acquisition of property for public purposes been consistent in interpreting the relevant constitutional provisions. The climax came when the majority judgment in *Golaknath's case*, A.I.R. 1967 S.C. 1643, held that Parliament had no power to amend fundamental rights. The subsequent decisions in the *Bank Nationalisation case*, A.I.R. 1970 S.C. 564, and the *Privy Purses case*, A.I.R. 1971 S.C 590, were regarded as evincing distrust in the intention and purpose of Parliamenary legislation. This trilogy of cases brought the Supreme Court into the arena of political controversy, referred to on occasions as a 'confrontation' between Parliament and the Supreme Court.

The author has analysed the subject of judicial review and fundamental rights in 11 chapters covering different aspects and facets incisively. According to him while the general trend of judicial review in relation to freedom and liberty has been one of restraint and moderation trying to hold the balance between the conflicting claims of individual liberty and social control the same cannot be said about the exercise of the review power in regard to property rights and that the conclusion seems to be irresistible that the judiciary has not been able to evolve a happy reconciliation between the individual rights of freedom etc., and taking its due share as an integral part and organ of a welfare State in the task of reconstruction of the Indian Society. The author's inference is on the whole sound. Equally acceptable is his view that though the blanket ban on Parliament's competency to amend fundamental rights laid down in *Golaknath's case* has been 'positively reversed' in *Keshavananda Bharati's case*, A.I.R. 1973 S.C. 1461, the latter decision cannot be regarded as having put an end to possible confrontation in future between Parliament and the Supreme Court. The statement on page 152 that the primacy of Parliament in India is unquestionable has necessarily to be understood as subject to the supremacy of the Constitution. The book is a scholarly production and is a welcome addition to the literature on the subject.

III. Industrial Adjudication with special reference to Reinstatement *by* R. S. Kulkarni, 1973. (Publishers: Progressive Corporation P. Ltd., Bombay). Price Rs. 28 : $. 5.60: £2.80.

Compulsory legal adjudication became a permanent feature of Indian Labour Law with the passing of the Industrial Disputes Act, 1947. If negotiations for settlement of a dispute between labour and management failed the matter is referred to one of the adjudicating authorities under the Act, namely, the Labour Courts and the Industrial Tribunals. The Tribunals generally derive their guidelines from the provisions in Part IV of the Constitution in the absence of any in the Act itself. The Tribunal gives expression to the concept of social and economic justice within the framework of the existing economy carefully balancing the interests of the employers and the employees. A labour jurisprudence is gradually developing. A significant innovation is the right of a discharged worker to reinstatement practically jettisoning the principle that a contract for service cannot be specifically enforced.

Though reinstatement is the normal rule in every case of wrongful discharge, yet in certain cases exceptions are made awarding compensation instead of reinstatement. The exceptions stem from the principle adopted by the Supreme Court that the management is primarily responsible for discipline and efficiency, and because of this a Tribunal often finds itself precluded from giving the proper relief. The book under notice examines the legal basis of reinstatement and the extent to which the Courts or Tribunals have granted it against the background of the framework of adjudication under the Act. The book is divided into 7 chapters. Chapter I deals with Theories of Freedom of Contract in Industrial Relations; Chapter II covers labour—legislation before and after independence; Chapter III examines the Structure of Adjudication Machinery under the Industrial Disputes Act; Chapter IV is devoted to Common Law and Reinstatement; Chapter V expounds the Theories of Reinstatement; Chapter VI deals with Judicial Review of Tribunals' Awards and Chapter VIII sets out the conclusions of the author. The author points out that the present approach of tribunals and courts to labour disputes is guarded and hesitant, their jurisdiction being regarded as revisional only in nature. The author desires that these bodies should be allowed to execise jurisdiction of an appellate character. There are 7 Appendices giving the Defence of India Rules, the texts of the Industrial Disputes Act, the Industrial Employment (Standing Orders) Act, Model Standing Orders etc. The treatment of the subject by the author is comprehensive. The step by step assessment of the development of industrial law in England and India enhances the value of the book. The book will prove helpful to members of the Bar and students of labour law, management etc., and to all interested in industrial relations.

IV. Principles of Civil Procedure *by* U.K. Jha, First Edition, 1973. (Yashodara Publications, Gaya). Price Rs. 14.

The book under notice contains a subjectwise presentation of the provisions of the Civil Procedure Code. A feature of the book is the non-mention of any decided case. The book is arranged in four parts. Part I is devoted to General Matters like Courts, their jurisdiction, various kinds of suits etc. Part II deals with topics like Parties to the Suit, cause of action, Pleadings etc. Part III covers Appeals and Part IV Execution. The enunciations are clear, lucid and in simple language. The substantial principles of law are explained with precision. The book will be helpful to lawyers and laymen alike.

V. The Orissa Hindu Religious Endowments Act, 1951 (Orissa Act II of 1952) *by* Srinivas Misra, Second Edition, 1974. (Published by M. Misra, Cuttack-2). Price Rs 10.

Though Religious Endowments form an all-India subject of interest several States have their own separate legislation. The Madras Hindu Religious and Charitable Endowments Act, 1951 was a pioneer in many respects and, on its validity being upheld, the Orissa Hindu Religious Endowmens Act was enacted. In the Preface to the book the author points out that even if the Orissa Hindu Religious Endowments Act, 1969 is introduced which he considers problematic, the utility of the present book will not be affected as most of the provisions of the 1951 Act find a place in the prospective Act of 1969. Brief notes are provided by the author sectionwise in the light of decided cases. The notes are pointed and helpful. The book has more than a local interest. In view of similar legislation in the southern States relating to Hindu Religious Endwoments the book will have value for lawyers and laymen even outside the State of Orissa.

Law and Life Insurance Contract *by* M.N. Srinivasan. Second Edition, 1974. (Published by Ramanuja Publications, Bangalore-3). Price Rs. 16: Foreign Rs. 25.

The book under notice is a dependable book marked by lucid and succinct presentation of the law relating to insurance contracts.

Life insurance has made considerable progress in the country since independence. The law relating to it has not however, received more than cursory attention. The author justly points out in the Preface "If laws are an aid to progress, then the codification of the life-insurance law as in America is most essential in India " The author has dealt with the subject in 15 chapters. Chapter 1 discusses Insurance and the Law; Chapter 2 considers Protective legislation; Chapter 3 deals with the formation of the Insurance Contract; Chapter 4 with Insurable Interest; Chapter 5 with Proposal and Policy; Chapter 6 with Non-disclosure and Misrepresentation; Chapter 7 with Representation and Warranty. While Chapter 8 discusses the topic of the Policy as Property—Assignment, Chapter 9 considers the topic of the Policy as Property—Nomination ; Chapter 10 deals with the Policy as Trust Property; and Chapter 11 with Claims and Title to Policy ; Chapter 12 is devoted to Agents ; Chapter 13 to Estate Duty and Life Insurance; Chapter 14 to Tax Laws and Life Insurance and Chapter 15 to Life Insurance and Stamp Duties.

The author's exposition of the law is neat and luminous. In discussing topics like insurable interest the author has brought together a wealth of relevant materials facilitating comparative study. His observation, apropos of the requirement of insurable interest, on page 72 that the decisions of the English Courts cannot be regarded as *ipso facto* applicable to or should be followed in India as there is here neither a statute corresponding to the English Gaming Act of 1774, nor conditions akin to those that were responsible for the passing of that Act in England, and that the position in India is more akin to that in the U.S.A. where also in many States insurable interest is held to be required though it is not on the basis of any statute, is sound. The author has taken into account all leading decisions and used them selectively. It is a pleasure to go through the book. It is a welcome publication

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[End of Volume (1974) 1 M.L.J. (Journal)]

Gokulakrishnan, J.

Periaswamy *alias* **Ponnuswamy Kandar**
v.
Meenakshi Ammal

S.A. No. 586 of 1972.
14*th February*, 1974.

Hindu law—Partition—Suit for declaration—Title—Plea of family arrangement—Binding nature—Detrimental to minors—Plea untenable.

Once it was found that a family arrangement was detrimental to the interests of minors the parties could not plead such family arrangement so as to bind the 1st and 2nd plaintiffs who were minors then.

K. C. Champakesa Ayyangar and *R. T. Gopalakrishnan*, for Appellant.

R. Sundaralingam and *V. Rajamanickam*, for Respondents.

S.J. *Appeal allowed*

[End of Volume (1974) 1 M.L.J. (N.R.C.)]